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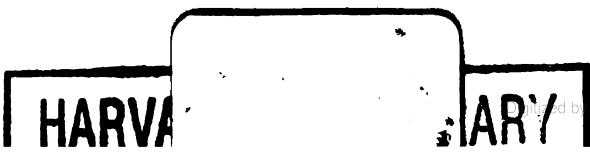
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OF

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BY

*THOMAS SERGEANT & WM. RAWLE, JUN.*

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**ERRATA.**

- Page 80, line 9, instead of a comma, after the word "*dollars*," make a period.  
 80, 10, strike out the period after the word "*cases*."  
 92, 24, before "*contemplation*," insert "*in*."  
 100, 22, for "*the legislative jurisdiction*," read "*their jurisdiction*."  
 101, 28, for "*reason*," read "*sworn*."  
 126, 9 from bottom, for "*mandamuses*," read "*mandamus*."  
 132, 20, for "*by*," read "*to*."  
 134, 26, for "*distinction*," read "*destruction*."  
 170, 11, for "*vendors*," read "*hawkers*."  
 170, 2 from bottom, for "*owned*," read "*obtained*."  
 241, 7 from bottom, for "*there*," read "*then*."  
 245, 25, before "*v. Ege*," insert "*Arthur*."  
 251, 8 from bottom, for "*receive*," read "*secure*."  
 296, 16, for "*leave*," read "*burn*."  
 382, 25, for "*on account*," read "*out*."  
 385, 3 from bottom, for "*strictly*," read "*only*."  
 387, 26, for "*he*," read "*or*."  
 463, 4 from bottom, for "*restrain*," read "*extend*."  
 482, 16, for "*direction*," read "*discretion*."  
 494, 5, for "*complaints*," read "*complain*."  
 500, 12, for "*last*," read "*less*."

# CASES

IN THE

## SUPREME COURT

OF

### PENNSYLVANIA.

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EASTERN DISTRICT, MARCH TERM, 1818.

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GUIER & DIEHL *against* PAGE.

1818.

*Philadelphia.*

—  
*Wednesday,*  
*March 13.*

THIS cause was tried at *Nisi Prius* on the 31st *January* last, before the Chief Justice, when a verdict was found for the plaintiffs for 1839 dollars 57 cents.

On a sale for approved indorsed paper, the construction of law is, paper which ought to be approved.

On a motion by the defendant for a new trial, which was now argued, the only question was, as to the true meaning of a sale for approved indorsed paper, which *J. R. Ingersoll*, for the defendant, contended, meant notes to be approved by the seller. The consequence he said was, that until the seller approved, the contract was open. This was the construction of all the auctioneers; and it was most convenient, because the credit of paper is a very delicate thing. He cited, *Cooke v. Oxley*. (a) *Webster v. Hoban*. (b)

THE COURT stopped Mr. *Chauncey*, who was about to argue for the plaintiffs, being clearly of opinion, that on a sale for *approved paper*, the construction of law was, *paper which ought to be approved*, and therefore the contract was not open.

New trial refused, and judgment  
for the plaintiffs.

(a) 3 *T. Rep.* 653.

(b) 7 *Cranch*, 399.

1818.

*Philadelphia.*—  
*Wednesday,*  
*March 25.*

## 1 The Commonwealth against CORNMAN.

A discharge under the insolvent laws of this state is valid, though the petitioner do not mention in the list of creditors returned to the Court, the name of the plaintiff at whose suit he is imprisoned; provided he has given the notice prescribed by the Court.

A *HABEAS CORPUS* issued in this case to *Cornman*, who was keeper of the debtors' apartment, to produce the body of *Richard Graff*.

The return stated, that *Graff* was imprisoned under an execution issued by alderman *Bartram*, for 57 dollars 48 cents, debt and costs, on a judgment obtained against him by *David Fisler*, before justice *Thompson*, which had been transferred from the docket of the justice to that of the alderman.

*Graff* was surrendered by his special bail on the 10th *September*, 1817. On the 9th *October*, 1817, he was discharged under the insolvent laws, on a petition dated *September* 18th, 1817; but the name of the plaintiff was not mentioned in the list of his creditors, returned to the Court of Common Pleas.

On this ground *Golder*, for the creditors, opposed his discharge.

*Lloyd*, for *Graff*, was stopped by the Court.

PER CURIAM. There is no appearance of fraud in this case. The Court of Common Pleas must have known, that *David Fisler* was a creditor, because *Graff* was imprisoned at his suit. *Fisler* had notice of the application for discharge, in the manner prescribed by the Court, *viz.* by advertisement in the newspapers, and might have objected. He was not injured by the omission of his name in the petition. We must suppose, that the Court of Common Pleas were satisfied, that their order for giving notice had been complied with. The proceedings, therefore, are complete, and the defendant having been discharged, was not liable to be arrested again for the same debt. This Court directs, that *Richard Graff* be discharged from imprisonment.

Prisoner discharged.

1818.

CURREN *against* CRAWFORD.

IN ERROR.

Philadelphia.

Monday,  
March 30.

THIS case came before the Court on a bill of exceptions to evidence, sealed by the District Court for the city and county of *Philadelphia*.

It was an action to recover the value of a quantity of lime sold and delivered by *Crawford*, the plaintiff below, to *Curren*. On the trial the plaintiff produced books, which he swore were his books of original entries of goods sold and delivered, and that the entries were made *at the times*, and by himself. On his cross-examination he stated, that he was present at some of the times when lime was delivered to *Curren*; that by "*the times*," mentioned in his examination in chief, he meant the times when the lime was loaded in the wagons at the lime kiln; that he was not present at *all* the times the wagons were loaded; that he was some times in *Philadelphia*, but was not present at *all* the times the lime was delivered there.

A certain entry in the book, in these words and figures was then referred to, "|| 15 *B. Marpol*.

60 *Themerty Coren*."

The plaintiff could not say he was present when the lime mentioned in that entry was loaded, or when it was delivered. On being examined by the Court, he said, he was at home five days out of six, and the lime which he did not see loaded, he generally saw delivered. He was in town one day in every week. Some of the wagons were his own, and some were his tenants, in his employ during the whole season.

The defendant's counsel objected to the reading of this entry, but the Court admitted it.

*P. A. Browne*, for the plaintiff in error. The practice of permitting a party to prove his own books, was introduced by necessity into this country; in early times few tradesmen kept clerks. It is in contravention of the general principles of evidence, and ought not to be extended to cases in which

A book of original entries, verified by the oath of the party, is good evidence to prove the sale and delivery of lime, and it is not necessary to fortify the book by the oath of the carriers by whom the lime was received to be delivered.

If a book appear on inspection or the examination of the party by the Court, not to be a book of original entries, the Court may reject it as incompetent.

If this does not clearly appear, it must be submitted to the jury to decide on.



1818. such necessity does not exist. It is confined to two cases, *Philadelphia*. viz. goods sold and delivered where better evidence cannot be procured, and work and labour done; and Courts are extremely careful not to stretch so dangerous a rule beyond these limits. A tradesman may prove his own books to charge an original debtor, but not a third person who has guaranteed payment. *Poultney v. Ross.*(a) He may prove entries made by himself, but not entries made by his daughter, who is dead. *Karsper v. Smith.*(b) A book of original entries is not evidence to prove the time a vessel lay at a wharf, in order to charge the defendant with wharfage. *Wilmer et al. v. Israel.*(c) Nor can a receipt for goods, written in a book of original entries, and signed by the person to whom they are delivered, be proved in any other manner than ordinary receipts, notwithstanding a custom to treat such receipts as original entries. *Sterrett v. Bull.*(d) The reason on which these cases are founded is, that other evidence of a more impartial character might be adduced. In the present case necessity did not require, that the plaintiff's books should be received in evidence. The time was received by the carters, who might have been brought forward to prove the delivery of it to the defendant. The evidence is objectionable too on another ground. It does not appear, that the entries were made at the time of delivering the goods, which our law requires. Nor is the Court bound to receive the books as books of original entries, if upon inspection they appear otherwise.

*Kittera*, for the defendant in error. There are only two objections which can be urged against the evidence offered in this case. 1. That that is not a book of original entries. 2. That the book is fraudulent on the face of it, containing erasures, interlineations, &c. The last objection is not made here. It is not necessary, that the entry should in all cases be made at the time of delivery, because it is impossible for any man to swear, that he remembers being present at the delivery of all the goods charged in his books. Day-books are *prima facie* evidence, not only of the delivery but of the price of goods, but not of money lent, or of cash paid. *Du-*

(a) 1 *Dall.* 238.(b) 1 *Browne*, (Appx.) 53.(c) 1 *Browne*, 257.(d) 1 *Dinn.* 234.

*coign v. Shreppel*; (a) though in *Redman v. Hoops*, (b) the 1818. Court permitted an entry in a book, made a long time before, to be read to the jury, in support of the presumption of payment of an old promissory note. There is nothing in the present case to exclude the rule. The selling of lime is a very extensive business, in which a great number of persons are employed. It is impossible for the carters to remember the contents of every load, or when and to whom they are delivered. It would, therefore, be highly unreasonable and inconvenient to require them to be brought forward to prove the delivery, when it can be proved as such facts usually are.

*Philadelphia.*  
CURREN  
v.  
CRAWFORD.

The opinion of the Court was delivered by

DUNCAN J. The bill of exceptions states the circumstances under which the entry in the book now objected to, was permitted to go to the jury.

Books of original entries, verified by the oath of the party, and that the entries were made by him, have always been received in evidence in *Pennsylvania*, from necessity, as business is very often carried on by the principal, and many of our tradesmen do not keep clerks. In the country there would be a stagnation of all credit, if this were not the case. It is superfluous to cite authorities to prove a course of proceeding, so notorious to all conversant in Courts of justice. The same necessity has introduced the same rule in other states. In *South Carolina*, *Foster v. Sinkler*, 1 Bay, 40, *Spencer v. Andrew*, 1 Bay, 119. In *Massachusetts*, 2 Mass. 221, *Cogswell v. Dolkin*. In *New York*, *Vosbury v. Thayer*, 12 Johns. 461.

In *Sterrett v. Bull*, 1 Binn. 237, the entry to be proved by the plaintiff must be an original entry made by himself. It must be an account of the daily transactions of the party, and not in the nature of a receipt book. It must be in a course of dealing between the parties, and the entries made about the time of the transaction. This book and this entry appeared to be of this description. The law fixes no precise instant when the entry should be made. At or near the time of the transaction, they should be made. It is not to be a register of past transactions, but a memorandum of

(a) 1 Yeates, 347.

(b) 1 Dall. 85.

1818. transactions as they occur. If the book appear, on investigation, or examination of the party by the Court, not to be such a one, the Court may reject it as incompetent. If this does not clearly appear, it is to be submitted to the jury to decide on. The book here was so submitted; its verity left to the jury. The plaintiff below, after having testified that this was a book of original entries, and that the entry was an original one made by himself, and on his examination by the Court, declared, that he was at home five days out of six, and that the wagons he generally saw, after loading the lime or delivering it, it was not necessary to fortify the book by the oath of the particular carter, to render it evidence. The entry accompanied by the supplementary oath of the party, was properly admitted.

Judgment affirmed.

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+ | The Chesnut Hill and Spring House Turnpike Company  
against RUTTER.

Monday,  
March 30.

IN ERROR.

An action of trespass on the case, lies against a corporation aggregate for a tort.

THIS was an action of trespass on the case, in the Common Pleas of *Montgomery* county, for stopping a water course.

The declaration stated, that the defendants below, the plaintiffs in error, were incorporated by an act of assembly, passed on the 5th day of *March*, 1804, entitled, "an act to enable the Governor of this Commonwealth, to incorporate a company to make an artificial road, from the top of *Chesnut Hill*, through *Flourtown*, to the *Spring House* tavern, in *Montgomery* county;" that the plaintiff was seised of a messuage, tanyard, and tract of land, through which a rivulet from time immemorial, had flowed, &c.; and that the defendants *contriving, and wrongfully, and injuriously intending to injure* the said plaintiff, and to deprive him of the benefit of working and tanning leather, in the said tanyard, and of the profit that might accrue therefrom, *did wrongfully and unjustly erect and set up, certain jetties or piers, on*

It seems that if the narrative state, that the act complained of, was unjustly and wrongfully done, without setting forth negatively, that it was not within the scope of the corporate powers of the company, it is sufficient. At all events, it is good after verdict.

each side of the said rivulet, by reason whereof, the said rivulet was thrown back, and overflowed the said tanyard, and destroyed a great quantity of hides, &c. 1818. Philadelphia.

By the 9th section of the act of incorporation, (a) the company had power "to erect permanent bridges over all the waters crossing the said road." The Chemut Hill and Spring House Turnpike Company v. BUTTER.

The jury found a verdict in favour of the plaintiff, for 305 dollars.

The errors now assigned were, 1. That the Court below permitted an action to be maintained against a body corporate for a tort.

2. That the declaration, if such an action could be maintained, set forth no cause of action.

*E. Ingersoll and Ingersoll*, for the plaintiffs in error. A recurrence to the history of actions will shew, that as early as the time of *Bracton*, a distinction existed between those which arose *ex contractu*, and those which arose *ex delicto*. Anciently the action of debt, was almost the only remedy for the recovery of money. Trespass was confined to cases of *force*. In the time of *Edward I.* debt was the form of action in which money was recovered, whether due on parol contracts or by specialty; specific chattels in detinue, while trespass was restricted to cases of direct and immediate injury to person or property. In the reign of *Edward III.* debt continued to be the usual remedy for the recovery of money on most contracts, but actions of account, annuity, and covenant, were also in use. Trespass became in this reign more general, but was usually confined to the redress of injuries to the person, as by battery or assault, and to property, as by taking goods and entering into houses and lands; it was never held, however, to extend to corporate bodies. About the middle of the reign of *Edward III.* the statute of *Westminster 2d*, authorised writs to be framed in *consimili casu*, under which the action of trespass was greatly enlarged in its scope, and so modified as to be adapted to every man's own case. The first action of this description, occurred in the 22d year of this reign, and was brought against a man who undertook to convey the plaintiff's horse across the *Humber*, and so overloaded his boat, that the horse was lost.

(a) *Pamph. L.* 215.

1818. During the reigns of *Richard II. Henry IV. and Henry V.* actions on the case became very frequent. In the time of *Philadelphia. Henry IV.* the term *trespass on the case*, was in familiar use. Before that period, this action, though applied to cases of consequential damage, was called an action of trespass simply. Its nature and character were then better understood, and the distinction between trespass and trespass on the case, was marked by a more nice discrimination. Whether it could be maintained on an executory promise, was much discussed at this time; it was, however, discountenanced, and did not receive the sanction of the Judges until the reign of *Henry VII.* *Reeve's History of English Law.* Part i. 230. Part ii. 28. 36. 158. 179. 182. 297. 346. Part ii. 22. *Hen. 7.* It was never, however, pretended, that an action of trespass *vi et armis*, would lie against a corporation, which, from its nature, is incapable of committing a tort; nor can the same thing in effect be done, by changing the form of action, and calling it an action on the case. Corporations can no more be guilty of torts than executors; the analogy between them, in this respect, is strong, and it has been decided, that trover does not lie against an executor for a conversion by his testator. *Hambly v. Trott.*(a) Indeed, it was once doubted, whether *assumpsit* would lie against a corporate body, because it could make no promise without affixing its seal, and the Supreme Court of this state, went so far on one occasion as to decide, that it would not. *Breckbill v. Turnpike Company.*(b) The remedy for a tort is not against the corporation, but against the individual who commits it, who may have his action over against those who employed him. The relation of master and servant, as it exists between individuals, does not hold between corporations and those who act under their orders. *Kyd on Corp.* 223. 260. 450. If the servant of a corporation commit an assault and battery, it will not be pretended, that the corporation is responsible. If it be not responsible for an assault and battery committed by its servant, the relation of master and servant does not exist; because nothing is more clear than that a master is responsible for the torts of his servant, committed in the course of his master's business. How can a distinction be drawn between an assault and battery, and injuries of the nature of

(a) *Comp.* 372.(b) 3 *Dall.* 496.

that complained of in this suit? It is impossible to say where the line should be placed.

1818.

Philadelphia.

The Chesnut  
Hill and  
Spring House  
Turnpike  
Company  
v.  
Barnes.

Corporations are the creatures of the law, of a highly refined and intangible nature, whose properties and attributes, lawyers alone can understand. Deriving their existence from the law, they must be governed by the terms of the law which creates them. They must proceed and be pursued in the path prescribed by the law. If the corporators do an act, beyond their corporate powers, they, as individuals, and not the corporation of which they are members, must answer it. If the corporation itself enter into a contract not authorised by its charter, no action founded on the contract can be sustained, though the individual members may be sued. Suppose an insurance company should undertake to make a turnpike road, or to build a church, could those who were employed by them, recover against the corporation as such? Every principle of the law of corporations forbids it. Now, a corporation never was and never can be authorised by law to commit a tort; they can invest no one with power for that purpose. If, therefore, an agent constituted for a legal purpose, inflict an injury, the corporation is no more answerable, than it would be for an act of that agent, done without any authority whatever derived from it, because being unauthorised to commit a wrong, it is out of the scope of its corporate powers. The act of the law, like the act of God, can work a wrong to no one, and if a man sustain damage by it, it is *damnum absque injuria*. The plaintiff in this case, therefore, must look to the individual from whose acts he sustained an injury, who never was, and never could be authorised to commit a tort. The principle that a body corporate can only act in strict pursuance of the objects of its incorporation, is stated and exemplified in the conclusion of the Lord Chancellor's opinion, in the case of *Child v. Hudson's Bay Company*.<sup>(a)</sup> It is also established by the cases of *Beatty v. Marine Insurance Company*,<sup>(b)</sup> and *Head v. Providence Insurance Company*,<sup>(c)</sup> *Steele v. President & Co. of Lock Navigation*,<sup>(d)</sup> *McGlenachan v. Curwen*.<sup>(e)</sup>

Between *nonfeasance* and *malfeasance*, a marked distinction exists. It is not denied, that for *nonfeasance*, actions

(a) 2 P Wms. 209.

(d) 2 Johns. 223.

(b) 2 Johns. 114.

(e) 6 Binn. 509.

(c) 2 Cranch, 166.



1818. of trespass on the case have been sustained, as in the case of *Philadelphia. The Mayor of Lynn, (in error) v. Turner, (a)* where the action was against the corporation of *Lynn Regis*, for neglect of duty, in not keeping a creek in repair; in the case of *Townsend v. Susquehannah Company, (b)* for neglecting to repair a bridge, and in several similar cases. *Gray v. Portland Bank, (c)* *Stephens v. Middleton Canal, (d)* In *Riddle v. Proprietors of locks and canals on the Merrimac, (e)* PARSONS C. J. lays down the law more broadly than by his authorities he is warranted in doing, yet he does not go so far as to assert the general proposition, that trespass will lie against a corporation. He merely says, that in *certain* cases, trespass may be maintained; and it is to be observed, that the action in which the opinion was delivered, was for a *non-feasance*; a neglect of a corporate duty in not keeping the canal in order.

On recurring to ancient authorities, it will appear, that trespass against a corporation for a *tort*, has never been sustained. THORPE J. in the *Book of Assizes*, 22 Edw. 3. p. 100. expressly says, that trespass never lies against a corporation. A corporation and an individual cannot be joined in trespass as defendants. 8 H. 6. 1. pl. 2. A corporation cannot commit a disseisin except for its own use. *Mich.* 8 H. 6. pl. 34. p. 14. *Mich.* 9. H. 6. pl. 9. p. 36. *Hil.* 22. H. 6. pl. 36. p. 46. Trespass does not lie against a corporation in its corporate name. *Vin. Corp.* pl. 15. p. 300. Nor will an attachment lie. *Id.* B. A. pl. 3. p. 311. Nor replevin. *Id.* X. pl. 17. p. 308. In trespass against an abbot he shall be named by his name of baptism. *Id.* Q. pl. 9. p. 300. An action for a false return to a *mandamus*, must be against the individual members of the corporation. *Id.* Q. pl. 50. p. 303. A corporation cannot beat or be beaten. *Id.* Z. pl. 2. p. 309. If a corporation disseise, it is in their natural and not in their corporate capacity. *Bac. Ab. Corp. E.* pl. 5. Trespass does not lie against a corporation. *Com. Dig. Plead.* 2. B. p. 196.

2. If the plaintiffs in error, be capable of inflicting the injury imputed to them, the declaration sets forth no cause of action. The object in incorporating the company was to make a good artificial road in the place of the old one. The

(a) *Cowp.* 86.

(b) 6 *Johns.* 90.

(c) 3 *Mass. R.* 364.

(d) 12 *Mass. R.* 466.

(e) 7 *Mass. R.* 169.

company, therefore, succeeded to all the rights previously 1818.  
 possessed by the public. It is the duty of the company to *Philadelphia.*  
 keep the road in good order, and to erect bridges over all *The Chesnut*  
 streams crossing it; and in the prosecution of this duty, they *Hill and*  
 are not responsible for consequential damages to individuals. *Spring House*  
 Besides, the persons over whose property the road is carried, *Turnpike*  
 are amply remunerated for their land, not only by having a *Company*  
 turnpike road passing through it, but by the allowance of six *v.*  
 per cent. for roads by the proprietary or the Commonwealth. *RUTHER.*  
 The declaration alleges the injury to have arisen from  
*jetties* and *piers*. What *jetties* are, it is difficult to say, and  
*piers* were probably necessary for the proper construction of  
 the bridge. As to what defects are cured by verdict, the  
 cases are contradictory. The rule may, however, be laid  
 down to be; that where the *gist* of the action is *informally*  
 stated, it is cured, but where the *ground of the action* itself  
 is not well set forth, it is not. In this instance, the decla-  
 ration sets forth no ground of complaint. It does not state,  
 that the jetties and piers were unnecessarily and improperly  
 placed. It is not enough to aver that the water was thrown  
 back upon the plaintiff, it should also have been shewn, that  
 this was not done in the prosecution of the legitimate pow-  
 ers of the company; a mere allegation of malice, and that  
 the act was wrongfully done, amounts to nothing. The pre-  
 dicament in which the company is placed, is unfortunate in-  
 deed. If they do not build bridges their tolls cease; if they  
 do, they are liable for consequential damages.

*Binney*, for the defendant in error. This case presents  
 three questions. 1. Whether a corporation can commit a  
 tort? 2. Whether, if it can, this is the proper form of ac-  
 tion? 3. Whether the cause of action is well set forth?

It must now be taken as proved, that the company gave  
 authority to their servants to do the act complained of.  
 The rule between corporations and their servants, is substan-  
 tially the same, as between individuals and their servants.  
 If, therefore, they give their servants power to do an act in  
 pursuance of their corporate character, and they do it im-  
 properly, the corporation are responsible in the same manner  
 as any other master. Why should a difference exist, and  
 why should a corporate body be protected in the commission  
 of wrong? If a corporation be the intangible being it is

1818. asserted to be, a greater and more mischievous monster cannot be imagined. According to the doctrine contended for, if they do an act within the scope of their corporate powers, it is legal, and they are not answerable for the consequences. If the act be not within the range of their legitimate powers, they had no right by law to do it; it was not one of the objects for which they were incorporated, and; therefore, it is no act of the corporation at all. This doctrine leads to absolute impunity for every species of wrong, and can never be sanctioned by any Court of justice. The master is responsible for the acts of the servant, not because he has given him an authority to do an illegal act, but from the relation subsisting between them. If the servant exceed the power he has received, the master must answer it. So if the company give their servant authority to make a road, in pursuance of their power to do so, and he exceed that authority, they are answerable, because he is their servant. The rule which makes the master responsible for the acts of the servant, is declared by SEDGWICK J. in delivering the opinion of the Court, in the case of *Gray v. Portland Bank*,<sup>(a)</sup> to apply with peculiar force to corporations and their agents. The position that a corporation can do no wrong, is pernicious in its consequences, and unfounded in law. If I put a note in bank, and wish to get it out, to put it in suit, and the bank refuse to deliver it, surely the remedy is an action of trover. If I refuse an exorbitant toll, in consequence of which, my horse is taken from me, and I cannot get him from the toll gatherer, can it be doubted, that I may have an action of trover against the company? If I cannot look to the company, there is no remedy, because the toll gatherer may be worth nothing, or may have gone off; nor can the individual members be resorted to, unless they were guilty of malice. If a quagmire or any other nuisance exist, the supervisors where there is no turnpike company may be indicted; and where a company are invested with the duties of supervisors, they may be indicted. The corporators as individuals cannot be indicted, because it is not within the line of their duty as such.

As to the form of action, it is difficult to point out any other remedy for injuries of this description than trespass on

(a) 2 Mass. R. 385.

the case, and if there be no other remedy, this is the right one. Assumpsit certainly would not lie, because there was no contract; nor would trespass *vi et armis*, because the damage was consequential. The old authorities which have been referred to, belong to a period, when the English lawyers were more distinguished for subtlety than for sound sense; and when the nature of corporations was greatly refined upon. It appears, however, from 2 *Inst.* 697. 703, that a corporation was then considered as substantially an inhabitant or occupier; and subsequently in *Rex v. Gardener* (a) it was held, that a corporation seized of land for their own profit in fee, are, within the statute of 43 *El. c. 2*, inhabitants or occupiers of such lands, and liable in respect thereof, to be rated in their corporate capacity to the poor. In the Supreme Court of the *United States*, it has been decided, that a corporation may sue in the Circuit Court of the *United States* as a citizen, *Deveau v. Bank of United States*. (b) The law on the subject of corporations has of late been greatly and beneficially altered. It was formerly held, that they could do nothing except under their seal, and for that reason *assumpsit* would not lie against them. All these niceties, however, are now repudiated, and they may enter into contracts either express or implied, without seal. When a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorised agents, are *express* promises by the corporation, and all duties imposed on them by law, and all benefits conferred at their request, raise *implied* promises, on which an action lies. *Bank of Columbia v. Patterson's administrators*. (c)

The opinion of THORPE J. which is much relied on, was nothing more than a *dictum*, and was grounded upon the necessity which then existed of a *capiatur pro fine* and *exigent*, which could not be entered against a corporation. These, however, are now exploded, and giving to the assertion of THORPE, all the weight to which it can possibly be entitled, the authority must fail, because the reason of it no longer exists. The distinction taken between a *misfeasance* and a *nonfeasance* is altogether ideal; it has no solid foundation.

(a) *Comp.* 79.(b) 5 *Cranch*, 65.(c) 7 *Cranch*, 299.

1818.

Philadelphia.

The Chesnut  
Hill and  
Spring House  
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v.  
BORTON.

1818. The authorities all shew, that the action will lie in either case. If a company be guilty of a *tort* by neglecting a road or bridge, how can they be reached but in this form of action? That this is the proper form, is proved by the cases adduced on the opposite side. The *Mayor of Lynn v. Turner*, was clearly an action of trespass on the case, for a *tort*; so was *Townsend v. Susquehannah Turnpike Company*, and *Riddle v. Proprietors of Locks, &c. on Merrimack*. In two of these cases the point was not made, and in the third, it was overruled. As respects the form of action, there is no difference between *nonfeasance* and *misfeasance*; trespass on the case, is the general form. We are, therefore, brought back to the point from which we set out, whether a corporation can commit a *misfeasance*, which is clearly proved, not only by the late, but by the ancient authorities, and even by some of those which have been cited for the plaintiffs in error. *Trespass against the Mayor and Commonalty of York*; plea that all the inhabitants had right of common, in the place where the trespass, &c.; not good, because the action is against the corporation, and the plea is a justification as to individuals. Plea altered, and the corporation said to be aiding in the trespass; adjudged that they cannot be aiding, nor can they give a warrant to commit a trespass without writing. 4 H. 7. pl. 11. p. 13. A corporation cannot authorise a wrong to be committed, *except by writing under their common seal*. *Brook. Corp.* pl. 34. p. 189. These authorities prove the *capacity* of a corporate body to commit a wrong, and shew the position said to have been laid down by THORPE, to be erroneous. *Trespass against the Mayor, Bailiffs, and Commonalty of Ipswich, and one Jabez*. Objection was taken, that a corporation and an individual cannot be joined in one writ, but no objection taken, to trespass having been brought against a corporation. 8 H. 6 pl. 2 p. 1. *Id.* pl. 34. p. 14. An assize of *novel disseisin* was maintained against the mayor and commonalty of *Winton*. *Lib. Ass.* 31. *Ass.* pl. 19. In trespass against a corporation, if defendant plead a *misnomer*, plaintiff may reply, known by one name or the other. 6 Vin. pl. 42. p. 303. The result of these authorities is, that even in ancient times, trespass could be sustained against a body corporate.

The objection to the declaration, is susceptible of an easy answer. It states, that a stream of water had, immemorially

flowed through the plaintiff's land, without injury to his tanyard, and that the defendants *unlawfully* and *wrongfully* erected piers, &c. which threw the water back and injured his tanyard. This would sufficiently set forth a cause of action against an individual, and does so equally against the company, unless they can shew an authority for such an act. If they can justify, they should shew their authority, either by pleading, or in evidence; for it would reverse the order of pleading, if the plaintiff were to set out negatively, the defendants' want of authority.

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GIBSON J. Should you put in your narr. shew the general authority to make the road, and negative the authority to do this act?

That is done. The narr. states, that the act was *wrongfully* and *unjustly* done. These are not mere words of form, but constitute the very *gist* of the action. It is, therefore, sufficiently set forth, that the act in question, was not in pursuance of the necessary powers of the corporation. The power to build bridges over streams, negatives the power to dam them up. If, however, any defect existed in the declaration, it was cured by the verdict, which being for the plaintiff, proves that the act in question was unauthorised. 1 *Saund.* 228. *Note*, where all the law on this subject is collected.

The opinion of the Court was delivered by

TILGHMAN C. J. This is an action on the case, brought by James Rutter against The Chesnut Hill & Spring House Turnpike Company, for an injury done to the plaintiff's land and tanyard, in consequence of certain piers erected by the defendants, on each side of a stream of water, by which the stream was obstructed and thrown back, and overflowed the plaintiff's land.

The defendants below, who are plaintiffs in error, rely on two objections. 1. That a corporation is not suable in this kind of action. 2. That the declaration does not state a good cause of action, even if the defendants were liable to an action in this form.

1. Corporations have lately been so multiplied in the *United States*, that they stand a very prominent part, in the

1818. *Philadelphia.* business of the country. It has, therefore, been necessary to consider, with great attention, their nature, and their rights, both as to suing and being sued. And as it would be extremely inconvenient, that they should do wrong without being amenable to justice, the inclination of the Court has been, to hold them responsible. There was a time, when it seems to have been supposed, that they could make no contract, but by writing under their common seal. The reason assigned was, that being incorporeal, and consequently incapable of speaking, it was impossible that they should enter into a parol contract. But upon reflection, this reason has been thought insufficient; for if pursued to its full extent, it would prove, that a corporation could not act at all. It has no hand to affix a seal, and must therefore employ an agent for the purpose. But this agent must receive his authority previous to his affixing the seal. It is necessary, therefore, that the corporation should have the power to act without seal, so far as respects the appointment of a person to affix the seal. Now if it can appoint an agent without seal, for one purpose, there is no reason why it may not for another. Accordingly, in the case of *The King v. Biggs*, 3 P. Wms. 419, on a special verdict in a case of capital felony, it was held, that the *Bank of England* might, without seal, authorise a person to sign notes in its behalf. And it was decided by the Supreme Court of the United States, in the case of *The Bank of Columbia v. Patterson's administrators*, 7 Cranch, 299, that a corporation may, without seal, enter into a contract, express, or even implied. In the words of Judge STORY, by whom the opinion of the Court was delivered, "when a corporation is acting within the scope of the legitimate purpose of its institution; all parol contracts made by its authorised agents, are express promises of the corporation, and all duties imposed on them by law, and all benefits conferred, at their request, raise implied promises, for which an action lies." By this decision, I consider the law as settled. It does, indeed, seem to have been the opinion of this Court, in the case of *Breckbill v. The Lancaster Turnpike Company*, 3 Dall. 496, that an action of *assumpsit* would not lie against a corporation. But the law had not been at that time fully considered, and I may say, that our late brother YEATES, who was on the bench when *Breckbill v. The Lancaster Turnpike Company* was decided, was satisfied as to the propriety of acquiescing in the

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authority of *The Bank of Columbia v. Patterson's administrators*. 1818.

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But it is objected that the present action is not on *contract* but on *tort*, and a very refined argument is brought forward, to prove that a corporation cannot be guilty of a tort. A corporation, say the defendant's counsel, is a mere creature of law, and can act only as authorised by its charter. But the charter does not authorise it to do wrong, and therefore it can do no wrong. The argument is fallacious in its principles, and mischievous in its consequences, as it tends to introduce actual wrongs and ideal remedies; for a turnpike company may do great injury, by means of labourers who have no property to answer the damages recovered against them. It is much more reasonable to say, that when a corporation is authorised by law to make a road, if any injury is done in the course of making that road by the persons employed under its authority, it shall be responsible, in the same manner that an individual is responsible for the actions of his servants, touching his business. The act of the agent is the act of the principal. (There is no solid ground for a distinction between contracts and torts.) Indeed, with respect to torts, the opinion of the Courts seems to have been more uniform than with respect to contracts. For it may be shewn, that from the earliest times to the present, corporations have been held liable for torts. Many cases have been cited from the year books. Upon examination, they do not all answer the citations, but enough appears to shew that the law was so understood. In 4 *Hen. 7. p. 13, pl. 11*, we find an action of trespass against the Mayor and Commonalty of *York*. Plea, that all the inhabitants had a right of common in the land where the trespass is supposed to have been committed: *held*, not good, because the action is against the *corporation*, and the plea is a justification as to *individuals*. In a subsequent part of this case, it is said that a corporation cannot give a warrant to commit a trespass *without writing*. This, if it be law, proves that a warrant may be given by writing, which is sufficient for the plaintiff's purpose, the point being, whether a corporation can commit a trespass. In 8 *Hen. 6. p. 1. pl. 11. and p. 14. pl. 34*, trespass was brought against the Mayor and Bailiffs, and Commonalty of *Ipswich*, and one *J. Jabez*. It was objected, that a corporation and an indi-

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1818. *Philadelphia. The Chesnut Hill and Spring House Turnpike Company v. RUTTER.* vidual cannot be joined in one action; but it was not objected that trespass does not lie against a corporation; and the objection is said to have been overruled in 14 *Hen. 8. 2.* In the book of assises (31. *Ass. pl. 19.*) it appears that an assise of novel disseisin was maintained against the Mayor and Commonalty of *Winton*. *Brook* lays it down, that if the Mayor and Commonalty disseise one who releases to several individuals of the corporation, this will not serve the Mayor and Commonalty, because the disseisin is in their corporate capacity. In the old books of entries are numerous precedents of writs of *quare impedit* against corporations, and in *Vidiart's Ent. 1.* is a declaration in an action on the case, (16 *Car. 2.*) against the Mayor and Commonalty of the city of *Canterbury*, for a false return to a *mandamus*. To come to more modern times, it was held in the Mayor of *Lynn, &c.* (in error,) v. *Turner*, (*Cowp. 86.*) that an action on the case lies against a corporation for not cleansing, and keeping in repair, a stream of navigable water, which it was bound to do by prescription, in consequence of which the plaintiff was injured. This was in the year 1774, a little before our revolution. The laws of the Commonwealth forbid my tracing this point through the English Courts, since the revolution, but we shall find abundant authority in the Courts of our own country. In *Gray v. The Portland Bank*, 6 *Mass. Rep. 364*, it is laid down, that the bank was responsible for wrongs done by itself or its agents. In *Riddle v. The Proprietors of the Locks, &c. on Merrimack river*. 7 *Mass. Rep. 169*, an action was maintained against the company for damage suffered by the plaintiff in consequence of the locks not being kept in repair. And in *Townsend v. The Susquehanna Turnpike Company*, (6 *Johns. 91.*) an action was supported for the loss of a horse, killed by the falling of a bridge, which the company had built of bad materials. These authorities put it beyond doubt, that the form of action, in the present case, is good.

The objection to the declaration remains to be considered. It is said, that the act of assembly, by which this company is chartered, gives them power to erect bridges over all the streams which cross the road, and, therefore, they are not responsible for any damages which may be suffered in consequence of these bridges. But this is too broad a proposition: for, granting that they would not be responsible for damages unavoidably

resulting from a bridge built in the best manner, and obstructing the passage of the water, no more than was necessary for its proper construction, it would not follow that they should not be answerable for damages arising from a bridge so carelessly or inartificially built, as to occasion an unnecessary and wanton obstruction. Now, the declaration alleges, that the defendants contriving, and wrongfully and injuriously intending to injure the plaintiff, &c. *did wrongfully and unjustly set up certain piers, &c.* So that we are bound, after verdict, to suppose that it was proved the defendants were in fault, in the manner of erecting the piers. To say, now, that they were guilty of no wrong, would be to declare that it is impossible for them to be made answerable for *any injury which may arise from any kind of bridge or piers.* This is going farther than I can permit myself to do, being satisfied that the law never intended to authorise damage without necessity. Whether the company would be answerable for damages occasioned by a bridge or piers, of proper construction, is a point of great importance, on which I give no opinion, as it does not arise in this case. I am of opinion, on the whole, that the judgment should be affirmed.

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Judgment affirmed.

I SOMMER *against* WILT.

4sr 19  
178 502

4 SR 1  
207 33.

Monday,  
March 30.

THIS was a special action on the case to recover damages for the malicious abuse of legal process, in which the jury found a verdict for the plaintiff for 9500 dollars. The defendant moved for a new trial, and the Chief Justice, before whom the cause was tried in *February*, 1818, reported the case and read the evidence from his notes.

In an action for the malicious abuse of legal process, the plaintiff may, in support of his declaration, give parol evidence of an agreement not to

issue execution on a judgment on a bond with warrant of attorney, without notice; but whether such an agreement is a good cause of action, is another matter, of which the defendant may avail himself by demurrer, or by motion in arrest of judgment.

The Court possess the power of setting aside verdicts where disproportionate and enormous damages have been given; but it must be a rank case to induce them to exercise that power. Therefore, in an action for the malicious abuse of process, the Court refused to award a new trial, where all the facts and circumstances of the case were fairly submitted to the jury, although they considered the damages unnecessarily high.

4 SR 19  
208 437

1818. On the 4th *June*, 1812, the plaintiff gave to the defendant *Philadelphia*. his bond with warrant of attorney, in the penalty of 12400 dollars conditioned for the payment of 6200 dollars in one entire payment, without interest, on the 4th *December*, 1812. On the 14th *July*, 1813, the defendant entered up judgment in the District Court for the city and county of *Philadelphia*, and issued execution for the amount of the penalty, returnable to *December Term*, 1813, by virtue of which the plaintiff's goods, consisting chiefly of merchandise, were levied upon to the amount of 11997 dollars and 50 cents, and sold at a great sacrifice. The District Court, on application to them, set aside the execution for so much as exceeded the condition of the bond.

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*Thomas Elliott*, the deputy sheriff, proved, that a *feri facias* was brought to the sheriff's office by the defendant; that he went in company with him to the plaintiff's store, which he entered, and then presented to him the *feri facias*; that he appeared alarmed, spoke to the defendant and said, it was very hard an execution should be issued.

Here the plaintiff offered parol evidence to prove, that it had been agreed no execution should issue without six month's notice.

To this *Phillips & Kittera*, for the defendant, objected, insisting, that parol evidence could not be received to contradict a bond, and cited 2 *Yeates*, 370.

*J. R. Ingersoll & Binney*, for the plaintiff, answered, that the evidence was not offered to contradict the bond, which was confessed as made, but to establish a parol agreement subsequent to the bond, and distinct from it.

By THE COURT. The evidence is directly in support of the plaintiff's declaration, to which the defendant pleaded *non cul.* Whether such an agreement be a good cause of action is another matter. The defendant might have demurred, or he may move in arrest of judgment, if the *narr.* does not set forth a good cause of action. The evidence must be admitted.

*Elliott* then stated, that the plaintiff asked him what he was going to do. He answered, "To levy on your goods." The plaintiff then said, that was not to be done; that no execution

was to issue unless he had information, or something to that effect; that it would ruin him if the execution were proceeded in; that he expected a large quantity of tobacco in a short time, or remittances for it, but at present the embargo or war prevented its arrival; and that the *feri facias* was for double the amount due. The witness asked the defendant how that was, when he was ordered to proceed and do his duty. This he did by taking an inventory of the goods, which he afterwards sold. The defendant did not deny what the plaintiff stated, but said, "Sir, I must have my money to make myself safe." The witness added, that he sold the plaintiff's stock in trade, his furniture, and his house and lot, but the real estate was sold under another execution.

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*William Geisse*, a friend of the plaintiff, swore, that in September, 1813, hearing that the sheriff had levied an execution on the plaintiff's property, he went to his house and authorised him to say to the defendant, that if he would accompany the witness to the sheriff's office, he would discharge the bond. On the following morning, as he was going to the sheriff's office, he met the defendant's attorney and told him he was ready to pay the bond, provided, he would withdraw the action immediately. The attorney said, the action should be withdrawn if the whole amount of the execution were paid; to which the witness answered, "I will pay the bond; as for the notes you had no right to seize for them." The attorney replied, "You need not tell me what I have a right to do. I will not give up a certainty for an uncertainty." After the goods were removed, the witness went to the defendant's attorney and requested he would have the furniture valued by two men, and offered to pay the amount of the valuation; urging as a reason for the request, that Mrs. *Sommer* being near her confinement, was not in a condition to be moved. The answer was, it could not be done, the furniture must be sold by the sheriff. On the witness observing it was very hard, the attorney replied, "If you will come and pay the bond now, I will withdraw the action." This was refused. This conversation took place three, four or five days after the witness's first interview with the defendant's attorney. *Geisse* then went to the deputy sheriff, of whom he inquired if the furniture could not be valued. He answered no; but if the witness would give his bond, the furniture might remain until after Mrs. *Sommer's* confinement. The witness stated,

1818. that notes to the amount of 5000 or 6000 dollars which he  
*Philadelphia.* believed were due, were included in the execution, but the  
 defendant's attorney said nothing particularly about them.  
*SOMMER* He then proved, that the plaintiff possessed considerable prop-  
*v.* erty at that time, and was in good credit; that another  
*WILT.* friend had offered to assist him by advancing 6000 or 7000  
 dollars; that goods like those of the plaintiff do not in gen-  
 eral sell well at auction, and that a great part of the plaintiff's  
 sold "enormously low." It further appeared from the testi-  
 mony of another witness, that the plaintiff was in pretty ex-  
 tensive business when the execution issued; that the defend-  
 ant was usually on his paper in all real transactions and ac-  
 commodations in bank, for which he received a commission,  
 and that he occasionally discounted his notes.

On the 9th *December*, 1813, the plaintiff filed his petition  
 for the benefit of the insolvent laws, and on the 6th *January*,  
 1814, was discharged.

The opening counsel for the defendant stated, that it had  
 been agreed that notes to be taken up by the defendant should  
 be covered by the judgment on the plaintiff's bond. Of this,  
 however, no evidence was given. The attorney, by whose  
 order the execution was issued, was offered as a witness on  
 the part of the defendant, and objected to on the ground, that  
 he was answerable to the defendant for what might be reco-  
 vered in this suit, as he had confessed that the execution had  
 issued through a mistake of his. The testimony was over-  
 ruled; but a release being produced, the witness was sworn.

He stated, that he gave his opinion as to the mode of pro-  
 ceeding on the plaintiff's bond, *founded on his client's state-*  
*ment of facts*; that he advised the defendant to enter judg-  
 ment; that he was of opinion, that he might cover the notes  
 under the penalty of the bond; that the real debt was endors-  
 ed and the *feri facias* issued by his order; that he had no  
 recollection of any conversation with Mr. *Geisse*, nor of any  
 offer by him or any one else to pay this money, and that he  
 never heard the defendant speak maliciously of the plaintiff.

The defendant had obtained a judgment against the plain-  
 tiff in this Court on the 8th *December*, 1817, for 7195 dollars  
 24 cents, founded on seven promissory notes, in which suit  
 the plaintiff pleaded his discharge under the insolvent law,  
 and the defendant replied, *per fraudem* and issue. Evidence

was also given to shew, that the plaintiff was in embarrassed circumstances before the execution issued, and that his real estate was heavily encumbered.

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After an argument by the same counsel, who tried the cause, the opinion of the Court was delivered by

DUNCAN J. This is an action on the case, for maliciously, and with a determination to harass, vex, impoverish, and distress the plaintiff, directing the sheriff to levy nearly double the sum due on a judgment, obtained by the defendant against the plaintiff, and causing the sheriff so to levy and to sell the goods of the plaintiff, to an amount exceeding the sum due, on which the execution issued.

The attempt by the defendant was to cover, under the penalty of the obligation on which the judgment was confessed, certain promissory notes, due by the plaintiff to the defendant. It is conceded, that this was contrary to all law, and to all experience, for it is certain, that even before the statute of 4th Anne, the penalty was considered in the Courts of law, as only a security for the principal sum due, the interest and the costs. *Amery v. Smalridge*, 2 W. Bl. 760.

The novelty of the action can form no objection, for this special action on the case was introduced, for the reason that the law never will suffer an injury and a damage without a remedy. Malice forms a necessary ingredient. In order to support the action, the injury and damage to the plaintiff must be proved, and it must be proved, that the injury and damage were occasioned by some malicious act of the defendant. Damages for injuries like this, have been recovered in this form of action at a pretty early period; for HOBART C. J. in *Water v. Freeman*, Hob. 264, says "I hold that I may have an action on the case against him that sues me against his release, or after I have paid the money." So for maliciously holding to bail, without any probable cause, where nothing is due, or in a sum greatly exceeding the debt due. The injury consists in the oppression and the malice. This malice may be evidenced from the want of probable cause. It would afford no protection against acts of oppression, did the law require express declarations of malice.

Where the act is an immediate wrong against all form of law, trespass *vi et armis*, is the proper action; but where the

1818. process is legal, but it is used in an oppressive manner, trespass on the case. In the one case, it is the immediate act that gives the party his action for the injury, without relation to the motive; in the other the motive of the act. Malice may, even in the highest offence, murder, be inferred from the circumstances, the *evidentia rei*. The circumstances may afford no evidence of malice, or the malice may be inferred from all the circumstances, each of which, however minute, is to be taken into consideration in coming to a conclusion. It is not individual malevolence, as by some it is mistaken for. Malice, as applied to this species of action, is an improper act, injurious to another, proceeding from an improper motive; whether it be done *propter odium vel causa lucri*; whether the motive be solely to break up the fortunes of a man, or whether it proceeds from oppressive acts under cover of the law and of legal process, by its means, and not permitted by the law, by which the perpetrator is a gainer, and the party acted upon receives a prejudice, as here to coerce the payment of another debt, by levying more on the execution than could be legally levied. Even the execution of legal process in an oppressive manner, tending unnecessarily to distress and injure a party, by an officer, gives the party injured, a remedy in this form of action. 5 Johns. 125.

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If this act had proceeded from ignorance or mistake of the law, on a fair representation of facts to the attorney, I would not impute the honest mistake of a professor of the law, to malice in the client, for here would be innocence, which would strip the case of its malignant qualities, and would, as I rather incline to consider the law, be a defence in the action. Certainly it would not be a case for heavy or vindictive damages. Had the attorney testified, that he had advised his client, and that without any special agreement to the effect, that he could cover under the penalty, not only the debt in the condition of the bond, but any other debt; that being a case without any species of malice, or improper motive, I would long hesitate, before I would say damages to any extent should be given. But this the defendant has shewn was not his case; for the attorney states, and no doubt truly states, (for I entertain too high an opinion of all the members of this bar, to suppose that there could be found in the body, one so ignorant of the law, as to direct an execution to be levied as was done in this case, unless on some

special statement of facts, which would distinguish this particular case ; as an agreement of the parties that it should be done,) that he was consu-<sup>1818.</sup> *Philadelphia.*  
 lated by the defendant, and that he <sup>SOMMER</sup>  
 gave his opinion on what he heard from him in a great mea- <sup>WILT.</sup>  
 sure ; on his statement of facts and his own view of the sub-  
 ject, and from what he believed to be the law arising on  
 these facts. It was not an abstract opinion on the legal right,  
 simply to cover other debts under the penalty, but on a  
 statement of special facts, and as there was nothing but sug-  
 gestion in the opinion of the counsel for the defendant on the  
 trial, unsupported by even an attempt to establish any agreement  
 between the parties, that the act complained of, should be  
 done, and as the opinion of the attorney was founded on mis-  
 representations made by the defendant, the client *Wilt*, must  
 suffer for all the acts to which such misrepresentations lead;  
 for otherwise the party injured would be without remedy ;  
 for the plaintiff could have no remedy against the attorney  
 who gave the directions, as he might have had for the gross  
 ignorance in giving such unwarrantable directions ; for the  
 act was too gross to be imputed to ignorance, and would  
 form presumptive, if not conclusive, evidence of improper  
 motives ; for as I hold the client not to act maliciously where  
 he takes legal advice, and confiding in that advice, pursues  
 his claim honestly and innocently, so I equally hold the at-  
 torney irresponsible for a malicious act, when such act is  
 founded on the misrepresentation of his client ; and if the  
 act was founded, as the defendant himself has proved, on  
 some representation, not supported or attempted to be  
 supported by any testimony, any subsequent act, done by  
 himself or by his attorney, springing from this misrepresen-  
 tation, is infected by it, and he is liable for all the conse-  
 quences. But here the act is brought home to the defend-  
 ant ; for the plaintiff stated in the presence of the defendant  
 and the officer, that the execution had issued for double the  
 sum, which the defendant did not deny ; and the officer turn-  
 ing to the defendant said, " is this so ? " and said, " here is  
 an execution put into my hands ; I must levy for the whole  
 amount endorsed on the writ." To which *Wilt* replied,  
 " you must do your duty ; the money I must have. I must  
 make myself safe."

*William Geisse* swears, that he called on the attorney, who  
 said, he would withdraw the action if the whole amount of

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1818. the execution was paid. The answer was, "I will pay you  
*Philadelphia.* the condition of the bond; as to the notes, you have no right  
 SOMMER to seize for them." The reply was, "you need not tell me  
 v. what right I have, I will not give away a certainty for an  
 WILT. uncertainty." It was afterwards proposed to the attorney,  
 that as the plaintiff's wife was near her confinement, and  
 could not be removed, two men should be appointed to  
 value the furniture, and the amount should be paid. This  
 likewise was refused, with a declaration that they must be  
 sold by the sheriff. It is true, the attorney said, "if the  
 bond be now paid, the execution shall be withdrawn;" but  
 it is unaccountable, that after the mistake had been discovered,  
 it should not instantly have been rectified; instead of  
 which, the sheriff is permitted to go on and sell to an amount  
 exceeding the condition of the bond. *Geisse* declared his  
 ability and readiness to pay the amount of the bond, and  
 gave further evidence, to shew that this would have been  
 raised by the friends of the plaintiff; for that Mr. *Sperry*  
 had offered to relieve him by the advance of 6,000 or 7,000  
 dollars. This is not an unimportant circumstance; it stands  
 uncontradicted, and was competent evidence; it went to establish  
 two facts; the credit of *Sommer*, and the readiness of  
 his friends to discharge the real debt.

All the facts and circumstances, the whole conduct of  
*Wilt*, and his attorney, who appears to have acted on the mis-  
 representation of *Wilt*; the property, the friends, the credit  
 of *Sommer*, his debts; all were fairly submitted to the jury,  
 to draw their own conclusions, and certainly, with very cau-  
 tious observations as to the quantum of damages, as favour-  
 ably for the defendant, as the state of the testimony would  
 admit of. The jury may not improperly have drawn con-  
 clusions very unfavourable to the defendant; that this op-  
 pressive act brought down upon the plaintiff immediate ruin;  
 that with the credit he possessed, with friends able and wil-  
 ling to assist him, he might have weathered the storm, over-  
 come his difficulties, kept his head above water, until the  
 reasonable expectation from the just speculations he had en-  
 tered into, would have been realised by a peace. For though  
 embarrassed, his credit was unimpaired; though in debt, his  
 creditors were not driving him to ruin by executions; and  
 that the seizure made by *Wilt*, beyond the legal right under  
 his judgment, brought down upon him all his creditors; de-

stroyed his credit with his friends, and forced him to the last sad resort, a prison, and the insolvent laws. If such might be the fair conclusions from the evidence, and I am by no means satisfied that they are not, it is to be considered whether the damages assessed by the only judges of damages, are so extravagant, disproportionate, outrageous and monstrous, as to call upon the Court to pronounce them to be the effect of intemperance, of passion, and not the deliberation of judgment. There is no standard, in actions of this nature, by which the Court can estimate damages; it is not a matter of calculation of pounds, shillings, and pence; some feelings must and will enter into the enquiry; the most obdurate heart cannot shut them out. It is not even a matter of mere compensation to the party; but an example to deter others; and as there were circumstances from which the jury might have inferred malice, and evidence which satisfied them, that the ruin of the plaintiff was occasioned by an act of oppression, and many aggravating circumstances of useless severity, my opinion is, that although the damages are high, higher than I could have wished them, yet this will not justify the Court in setting aside the verdict. And though I do not entertain any doubt as to the power of the Court to interpose a discretion, in cases of disproportionate and enormous damages, yet the case must be a rank one, and I am not satisfied but that the public justice will be more advanced by suffering the verdict to stand, than by disturbing it.

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One argument urged by the counsel for the plaintiff in error, remains to be answered. They conjecture that the jury took into consideration the verdict obtained by *Wilt* on the promissory notes, and, influenced by this, gave a verdict for a sum exceeding that verdict, under the impression that this was the only way in which they could compensate the plaintiff for the injury sustained. This is mere conjecture; but I am not prepared to say that this was an improper view of the subject. If they were of opinion that this act of *Wilt* produced the insolvency of *Sommer*, and rendered him unable to pay the debt of *Wilt*; if they did not find a sum beyond that, it would be no retribution to the plaintiff, nor punishment of the defendant.

A case, somewhat resembling this, is to be found in 2 *Wm. Bl.* 942. *Sharpe v. Brice*. Trespass against a custom house officer for an unsuccessful search after prohibited and uncus-

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**WILT.** *PERROT*, Baron, who tried the cause, reported the damages to be very excessive, and advised the application for a new trial. *DE GREY*, C. J. who delivered the opinion of the Court, says, "These damages are outrageous and excessive, but the case is peculiarly circumstanced; it is admitted that the present defendant has recovered in a former action for a smuggling penalty of 300*l.* against the now plaintiff. This he offers to set off against this 500*l.*; but the present defendant refuses it. This shews a want of candour on his side, and therefore he is entitled to no assistance." Now here it is agreed that against the amount of damages recovered in this action there shall be set off the judgment of *Wilt v. Sommer*. I cannot say that if the jury did take this view of the subject, it was a very erroneous one. It was again urged that this execution remains in full force, and not set aside by the District Court. Not so; for it is virtually set aside by the plaintiff's attorney, in the suit, agreeing to take out of Court the real debt due on the bond. But it receives a decisive answer. How if the plaintiff had a subsisting execution for the notes, could he proceed to recover them in an original action, as he has done?

It is objected that this action could not be supported by the plaintiff; that as it was an injury to his estate it passed to the assignees by the assignment. This personal tort is not the subject of assignment under the insolvent debtors' act; it is neither estate, credit, nor effects. The insolvent debtor would not be discharged from personal responsibility for such acts committed by him. The case in 2 *Dall.* is conclusive. •It is a personal action which would die with his person. If it passed by the assignment, and vested in the assignees, his death could not affect it.

The magnitude of the damages seemed to call for a more minute detail of the evidence and a more expansive course of reasoning than is usual in motions for new trials.

I am of opinion that the rule to shew cause be discharged, and that judgment be entered for the plaintiff, with liberty to the defendant to set off the amount of the judgment he has recovered against the plaintiff.

Judgment for the plaintiff.

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**FAUDEL and another against The Phoenix Insurance  
Company.**

*Monday,*  
*March 30.*

THIS suit was brought on a policy of insurance effected with the defendants on the 30th June, 1807, by Messrs. *Gurney & Smith*, as agents for the house of *Faukel & Stackman*, of *St. Thomas's*, at a premium of six per cent. on goods on board the schooner *Antoinette*, *Louis Colombo* master, at and from *St. Thomas's* to *Laguira* and back. The property was "warranted by the assured free from any charge, damage, or loss, which may arise in consequence of the seizure or detention of the property, for or on account of any illicit or prohibited trade."

Insurance on goods at and from *St. Thomas's* to *Laguira* and back, "warranted by the assured free from any charge, damage, or loss, which may arise in consequence of seizure or detention of the property for or on account of any illicit or prohibited trade." The vessel was captured by a Spanish privateer within half a league of the Spanish coast, and rather more than a league from *Laguira*, and carried into *Porto Cabello*, where the goods were condemned under the decree of *Aranjuez* of 19th February, 1809, which adopted the *Berlin* decree of 21st November, 1806, forbidding trade in British merchandise, and declaring all merchandise belonging to England or coming from its manufactories and colonies lawful prize.

The *Antoinette* sailed from *St. Thomas's* on the 14th June, 1807, and on the 18th of the same month, at the distance of half a league from *Macuto*, and rather more than a league from *Laguira*, she was met by a Spanish privateer called the *Escova*, which took possession of her and carried her into *Porto Cabello*, where proceedings were instituted in the court of admiralty, in consequence of which the plaintiff's goods were condemned, and the vessel and the rest of the cargo restored. The sentence of the court, or council in which the proceedings took place, the Reporters have inserted at length, thinking it would be more satisfactory to publish the whole document, than to present a mere abridgment which might be defective. Indeed it was found difficult, if not impossible to condense it, without impairing the whole structure of the decree, and rendering the grounds on which the council proceeded less intelligible.

**"TRANSLATION.**

"I, the undersigned notary, certify, that the following sentence was this day agreed on by the members of the council.

"In *Porto Cabello*, on the twenty-fourth day of June, one

*Held*, that this was not a loss by seizure for illicit or prohibited trade, within the meaning of the warranty.

1818. thousand eight hundred and seven, the members of the council being met, present Don *Augustin de Figueroa*, chief commandant of marine of said place and of the adjacent islands, including *Porto Rico*; military commandant of seamen and persons employed in commerce; special judge in cases of prizes, shipwreck, fisheries, and navigation; member of the boards of health and of property, and president of this council, and the other members whose names are hereunto signed, who being met for the purpose of deciding on the legality of the capture of the *Danish* schooner called the *Antoinette*, taken by the private armed vessel belonging to this place, called the *Escova*, on the eighth day of the present month; and having heard the opinion of the auditor founded on the royal order of the twenty-third of *February* in the present year; on the imperial decree, and another royal order of the twenty-fifth day of *August* of the last year; and on the decree for opening a free trade with the allied powers; and in conformity thereto did decree and do declare as having been lawfully detained, the said schooner, and that the goods and effects found by the surveyors to be *English* manufacture, are lawful prize; that the rights of the parties be reserved to them for such purposes as they shall think fit, conformably to the sixteenth article of the ordinance relating to private cruizers, and that the box of woollens, of which the two surveyors were doubtful, as well as their umpire, be delivered to the captured captain, together with the other goods and effects not of the said manufacture; that his papers be returned to him, leaving a proper memorandum therefor; and that a valuation of the aforesaid goods and effects be made, and that they be disposed of at public auction, and public notice given thereof at the usual places; notifying the officers of the royal finance, that they may settle the account of the owners of the privateer, and persons interested therein; and the sale being completed, that there be deducted from the whole amount, the tenth part belonging to the admiralty, which shall be deposited in the treasury of the marine, and also deducting the charges and fees due to the present notary; the remaining goods to be freely delivered to the owner of the privateer, to be distributed amongst those interested, according to their contracts, and agreements; and that this act be entered of record, and the parties notified thereof. Thus done, conclud-

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ed and signed, which I, the said notary, certify. (Signed) 1818.  
 &c. Before me, *Fernando Ponce*, marine notary. The *Philadelphia*.  
 foregoing is a true copy from the original remaining on the  
 record of the acts of council, and to which I refer. In tes- FAUDEL  
 timony whereof I have signed and sealed the present in *Porto* and another  
*Cabello*, the day, month, and year of its passage. (Signed) v.  
*Fernando Ponce*, marine notary. The Phoenix  
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“*Notification.* I immediately afterwards communicated the preceding sentence to *Don Louis Colombo*, and through him, to the supercargo, *Mr. John Henry Otto Eschen*, in the royal custom house. Certified, *Ponce*, notary.

“I then communicated the same to *Don Vincente de Ayesta*, at his house, as owner of the privateer called the *Escova*. Certified, *Ponce*, notary.

“I, the undersigned notary, certify, that at a court held yesterday, the following decree was passed; In this district of *Porto Cabello*, on the fourteenth day of *July*, one thousand eight hundred and seven, the court being full, present *Don Augustin de Figuerva*, brigadier of the royal navy, chief commandant of marine at this place, and the adjacent islands, including *Porto Rico*; military commandant of seamen and persons employed in commerce; special judge in cases of prize, shipwreck, fisheries, and navigation; member of the boards of health and of property, and president of this council; and the other members whose names are hereunto signed, being met in order to determine on the incidents moved by the consignee of the brig *Sea Nymph*, and the supercargo of the schooner *Antoinette*, and having heard the opinion of the auditor, which is as follows:—

“*Messieurs, the President and Members of the Court,*

“The correspondence or connexion which is preserved amongst our laws, wisely established for the purpose of injuring our enemy, far from preventing the progress of so important an object, forms a code of rules supported by which the Judge may assert with the decisive stroke of decision, (without injustice to either party,) the honour of the nation, and an exact compliance with the will of our sovereign. This requires from your superior tribunal, as being the de-

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pository of his authority and confidence, to support the laws and general customs of the kingdom, and those of the *provinces* within the extent of this district, by creating for that purpose within the same, subordinate tribunals, upright and just, in order to turn to the benefit of the state the fund of concealed ferocity, which is found in all those enjoying the privileged jurisdiction of the marine, and at the same time to furnish to them objects which may electrify them and infuse into them an ardent love for the royal service. The ill understood policy with respect to our allies in resting upon their good faith, that they would not introduce goods of *English* enemy manufacture; the imaginary prejudice which is supposed to result to commerce by *prohibiting a similar intercourse*, and the plausible arguments by which it is attempted to prove the lover of agriculture will be ruined if our ports are closed against the malevolent industry of the haughty *English*, are mere pretences used by heedless individuals, who aspire only to the increase of their wealth, and to avoid the smallest sacrifice which might turn to the benefit of their king and country. But none of these considerations will prevent your excellencies from encouraging the persons engaged in cruising, in detaining every neutral vessel *bound to ports on this continent*, should their cargoes contain any portion of goods manufactured by the tyrants of the seas, and the sacrilegious infringers of the rights of peace, as well as of war. It is not known to whom the goods belong, except so far as is shewn by those who carry them, and it is very probable, that when they come sealed with the arms of the enemy, they own part if not the whole; or that the *neutrals* being sure that they would not be repulsed; or that even if it was attempted, their bare assertion will be sufficient to tranquillise the most ardent zeal, through respect for the rights of neutrality; the prohibition pronounced by an edict, and communicated to them, whereby they cannot argue that they have not been apprised of the circumstances under which they have been admitted into our ports, that is to say, under the express condition of not importing goods of *English* manufacture, persuaded the maritime authority, that neutrals complied exactly with the conditions agreed on, by the frequent importation of goods and effects, which they made during a year or more, since the date of the act of 25th *June*, of last year, issued by the au-

thority of the captain general, superintendant of the province. But the captures made by privateers from hence, have given us physical proof of the fraudulent conduct of the allies, in contempt of the authorities who made the aforementioned act, and it is also proved by the *interception of prohibited goods*, effected by the *Guarda Costas*, in the very bay of this port, which were attempted to be introduced clandestinely in spite of the vigilance of the land guard. This alone would be sufficient to pronounce as good and lawful prize, the goods and effects found on board the vessels; the schooner *Antoinette*, coming from *St. Thomas*, an allied colony, belonging to *Denmark*, and the hermaphrodite brig the *Sea Nymph*, of *North America*, which, loaded with a great number of bales and trunks of goods, manufactured by hands, stained with the blood of the innocent victims, which excite our rage, and impel us to a just vengeance, would endeavour to introduce them by the same manner in which the others attempted.

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And from such reproachful, illegal, or clandestine importations, what benefit can arise to the treasury or to the country? Those Spaniards offend against the former, who have had the baseness to mix with such vile commerce, and no honour could arise to the latter, by sheltering in its bosom such atrocious delinquents. How many goods have already been introduced by our enemies, under the cloak of neutrality, by the tolerance of believing on their bare assertion, that the marks and stamps were used to obtain better sales? Is not this a deception? Yes, sirs, contrary to the laws of commerce. Such conduct from foreigners discovers malice. This on the supposition that their ignorance of a prohibiting law cannot excuse them. It should rouse the resentment of every Spanish subject, if there yet runs in his veins any of the blood of his ancestors, those faithful soldiers, who, in the support of the rights of the monarchy, made whole kingdoms tremble, and who far from having any thing to do with such shameful proceedings, or suffering themselves to be seduced by their avidity, will rather nobly support a prohibition, which of itself is sufficient to prostrate the enemy, and drive him to inconsolable despair. The *private cruisers* in pursuance of the orders which authorise them to examine neutral vessels, detain and carry them to the ports where they are fitted out, in case of having well

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1818. founded suspicions, that part, or the whole of the cargo may belong to enemies of the crown, have intercepted, on the coast, and within sight of the ports of this province, the two vessels in question, under strong suspicions that almost the whole of their cargoes belong to our enemies ; and the goods having been examined by intelligent surveyors appointed by the parties, being found to be from the manufactories of *London*, and the reasons alleged by the captor, shew that they have endeavoured to introduce the said goods by surprise, which they now acknowledge to be of that kind, whereas, before they were brought into a Court of justice by the captor, they denied to be such, under the oath of their religion. It also appears, from the proceedings in this case, that there has been published in *North America*, in the usual form by the public papers, the imperial decree, and the royal order of the 9th *February*, in the present year, which fact argues against all the captured parties, and convicts them of smuggling. It also appears, that our enemies do not respect the neutral flags, but capture all neutral vessels leaving our ports laden with goods the manufacture of our country, and by a reciprocity founded on the said ordinance, we ought to declare as good prize, the vessels of friendly powers which have on board enemies' goods. From what has been advanced, there is no reason to doubt the propriety of pronouncing sentence, in the case of the *Antoinette* and the brig ; considering, that by the 19th article, which authorises Spanish cruisers to examine neutral vessels, and in case of their not being willing to submit themselves to a regular examination of their papers and cargo, to oblige them by force, if they find the 20th part to be *prohibited goods*, or they doubt as to the property of one 25th part, in consequence of the quality of their fabrics, involving vehement suspicion that they are enemies property. That the goods in question are *prohibited*, the act of the 25th *June*, already cited, sufficiently proves; and that the captured have proceeded fraudulently is sufficiently demonstrated ; the condemnation, therefore, as good prize, would be just and regular, and in conformity with the royal order of the 25th *August*, 1806, there ought to be delivered to the owner of the privateer, the confiscable articles, deducting the 10th part belonging to the admiralty, leaving to the captured, in virtue of the royal order of the 9th *July*, 1805, the vessel, and remaining goods

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of lawful introduction ; in doing which, it appears to me, the royal will is complied with, by acting on these considerations with these friends. But no, gentlemen. This tribunal sits in the view of provinces, which are criticising the conduct of privateers, as violations of the laws of neutrality, notwithstanding they are acquainted with the positive *data*, which I have stated. And yet there are those who have entered the field of controversy, representing this as prejudicial to commerce, to the treasury, and to agriculture, though they must be well convinced of the contrary; being inclined to protect with this false view, a delinquency, which, if we advert to the manifest which his serene highness, the prince generalissimo and admiral, thought proper to issue on the 20th *December*, 1804, ought to be punished as the most abominable offence. Let it be the Supreme Tribunal of the Admiralty, by the terms of the royal order of the 19th *February*, and the imperial decree, which, with its high penetration, shall seal the irreproachable conduct of this tribunal, and of the privateers. Their owners would gladly receive a determination which would give them a hope of seeing their conduct approved by the first authority of the royal body of marine ; and in case of captures, where a condemnation does not follow, the detention will be a warning to neutrals to abstain from illicit trade, without its working as a discouragement to the interception of clandestine commerce: and to the assailing of the enemy with such honourable hostilities, and although this district is under critical circumstances, being obliged, as it were, to beg for its subsistence, in consequence of the refusal of the superior authority to furnish the necessary funds for that purpose, yet this has not dismayed the zeal of your honours, in making the last efforts when occasion and necessity require, to convince in a short time, our haughty enemy, of your sacred ardour for the national honour. I am, therefore, of opinion, that in conformity with the twelfth article of the ordinance relating to private cruisers, the proceedings in the present case, be laid before the supreme tribunal of the admiralty, by way of consultation, and the parties notified ; and the record carried up, and that it may be pleased, to decide according to the royal will. That the goods and effects being sold at public auction, in the manner directed by the decrees of detention, of the 24th and 27th *June* last, the portion belonging to the admiralty, be depo-

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1818. *Philadelphia.* sited in the royal treasury ; and the remaining sums be delivered to the owner of the privateer, under sufficient security to return the same, if in any event it should become necessary ; and in case he is not willing to give such security, it be deposited in the marine treasury until the supreme determination. That the present decision may serve as a rule for all other prizes of this nature, brought by privateers into this or other ports within this jurisdiction, for which purpose, let a certified copy of these proceedings be sent to all the inferior tribunals, to prevent injury to the parties having recourse thereto, *and also a certified copy of the royal order aforesaid*, and the documents on which my arguments are founded, that the same reasons may be objected to those who are opposed to these proceedings. And as it respects the last survey on the goods and effects of the *Antoinette*, although it is supposed, that the first was sufficient, yet, in consequence of its differing from the second, let there be restored to the owner, the trunk of linens, and box of veils and ribands, and taking as English manufacture, the hog-head and box of glass ware, together with the trunks of cotton stockings. But, notwithstanding my opinion, your excellencies will be pleased to decide as usual, according to justice. Agreed to by the council, and it conforms to the literal meaning thereof, and orders, what is therein recommended, to be carried into execution. That from the sale to be made, there be deducted the costs, charges, and fees, which shall be taxed by the present notary ; and that a certified copy of these proceedings be made out and communicated to the parties. Thus done and signed ; which I the notary certify. (Signed), &c. Before me, *Fernando Ponce*, marine notary.

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“ The foregoing is a true copy from the original, to which I refer ; in testimony whereof, I have signed the present in *Porto Cabello*, on the fifteenth day of *July*, one thousand eight hundred and seven. (Signed), &c. *Fernando Ponce*, marine notary.

“ *Notification.* Immediately afterwards, I made known the preceding sentence to Don *Vincente Maria de Ayesta*, at his house, as owner of the privateer, the *Escova*, which I certify. (Signed), *Ponce*, notary.

“ I then communicated the same to Mr. *Luis Colombo*, captain of the schooner *Antoinette*, and by means of him to

the supercargo, Mr. *John Henry Otto Eschen*, as he understood the English language, at the house of Don *Felipe de Villarante*, and in his presence; and they were fully made acquainted therewith. Certified, *Ponce* notary.

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"*Porto Cabello*, 31st *July*, 1807. On this day, between twelve and one o'clock in the afternoon, the following memorial was delivered to me for presentation; and at the request of the party, I have made a memorandum thereof. Certified, *Ponce*, notary.

"*Memorial*. To his excellency, the commandant of marine, *John Henry Otto Eschen*, supercargo of the schooner *Antoinette*, belonging to *St. Thomas*, detained by the privateer commanded by Don *Geronimo de Arreche*, in right of his freighters, Messrs. *Fauvel & Stakeman*, respectfully represents; that in consequence of the tribunal of the 27th of the present month, directing that I should be furnished with the necessary documents, relating to my detention, if I should require them, I request that the notary may deliver me triplicate copies of the decrees of the 24th and 27th *June* last, and of the 14th *July*, inserting the valuation of the fifty-four packages, with various marks and numbers, that have been detained and declared prohibited, of the cargo of said vessel, whereof I am the consignee; and the said three copies being made, I am ready to pay the customary fees. I pray your excellencies will be pleased to order according to my request, it being just and necessary. Further, that you will be pleased to order to be restored to me, the original invoice and papers belonging to the cargo of the schooner, delivered by the government of *St. Thomas*; which I presented to shew the impropriety of the detention of the vessel; since she must now proceed to *Laguaira*, with the goods which have not been declared prohibited; a proper memorandum being made of the delivery thereof to me. (Signed), *John Henry Otto Eschen*.

"The preceding having been presented. Ordered, that authenticated copies of the proceedings of council be granted, but without including what is requested as to the valuation, it being inadmissible. Further, let the invoice presented by the party be returned; the other papers requested, have been delivered to the captain of the *Antoinette*, *Luis Colombo*. (Signed), *Figuerva Hernandez*. Thus ordered by his excellency, the principal commandant of marine, with his ex-

1818. cellency, the auditor, in *Porto Cabello*, on the first day of  
*Philadelphia. August, 1807.* Before me, *Fernando Ponce*, marine notary.

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"Immediately afterwards, I communicated the preceding to the party, at the house of *Don Felipe Villasante*, leaving a copy of the documents ordered. Certified, *Ponce*, notary.

"The foregoing documents are true copies from the originals in the present case, and to which I refer. And for the purpose of delivering them to the party, I have caused the present copy to be drawn out, and have signed and sealed the same, in eighteen leaves of paper, the first with the second stamp thereon. *Porto Cabello, 6th August, 1807.* (Signed), *Fernando Ponce*, marine notary."

The cause was tried twice ; first on the 8th *March, 1815*, when the jury found a verdict for the plaintiffs. A new trial was granted for the purpose of enabling the defendants to procure evidence of the existence of an alleged order of the king of *Spain*, or of the captain general and intendant of the province in which *Laguaira* is situated, prohibiting the importation of goods of British manufacture. The second trial took place in *November, 1817*, before *DUNCAN J.* at *Nisi Prius*, when the plaintiffs examined *James S. Cox*, esq. President of the Insurance Company of *Pennsylvania*, who swore that 3 per cent. was a good premium for a peace risk, at and from, *St. Thomas* to *Laguaira*, in the month of *June*, which was as fine a season as there could be for the voyage ; that it was a voyage of only two or three days to *Laguaira*, but that a fast sailing vessel might be a week or ten days in returning. Several witnesses were examined under a commission to *St. Thomas*, who swore that although they had been much in the trade between *St. Thomas* and *Laguaira*, they did not, at the time the *Antoinette* sailed, know of any decrees of the French or Spanish governments prohibiting the importation of English manufactures into the Spanish colonies ; that they had never known of the official publication of such decrees at *St. Thomas* or on the *Spanish Maine*, and that both before and after the capture of the *Antoinette*, vessels were admitted at *Laguaira* with goods of English manufacture on board, which were regularly entered at the custom house, paid duty, and were openly sold.

On the part of the defendants, one witness swore that he engaged in a voyage from *Philadelphia* to *Laguaira*, in the

schooner *Juliette*, and arrived off the port of *Laguira* towards the end of *June*, 1807, when he was captured in sight of the place by a privateer, on the ground that the schooner was loaded with British goods; that he heard it said that the *Berlin* decree had been proclaimed, by beat of drum, as the law of the land; that other vessels were stepped on the same account, and that all those which were carried into *Laguira* were acquitted; while some were condemned at *Porto Cabello*.

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After the testimony was closed, and the cause discussed by the counsel, the following charge was delivered to the jury, by

DUNCAN J. This action is on a policy of insurance, underwritten by the defendants on goods shipped on board the *Antoinette*, at and from *St. Thomas* to *Laguira*, and back, "warranted by the assured free from any charge, damage, or loss which may arise in consequence of the seizure or detention of the property, for, or on account of any illicit or prohibited trade." The undisputed facts are, briefly,—The schooner sailed from *St. Thomas* for *Laguira* on the 14th *June*, 1807. She proceeded on her voyage until the 18th, when, within little more than a league from *Laguira*, and within half a league of *Macuto*, she was captured by a Spanish privateer, and carried into *Porto Cabello*, where the plaintiff's goods were condemned, and the vessel, with the rest of the cargo, restored. The condemnation was on the ground that these goods were of British manufacture. The neutral character of the vessel, and of the owners of the goods, the protest and the abandonment are clearly proved. The defendants gave in evidence a sentence of condemnation by the counsel of *Porto Cabello*, and contend that they are not liable for this loss, because they say it happened in consequence of a seizure and detention of the property on account of an illicit or prohibited trade. By the plaintiffs it is insisted on, that they are liable for this loss, because they say it happened in consequence of a seizure and detention of the goods as goods of British manufacture, and that the trade in British manufactures was not an illicit and prohibited trade, within the meaning of the exception, inasmuch as there was no other prohibition than the *Berlin* decree of 21st *November*, 1806, adopted by *Spain*, on the 19th *February*, 1807, which they con-

1818: tend was against the law of nations, and a lawless violation of the property, insured against by the policy, and not excluded by the exception. Other testimony is given by the parties; the time in which the voyage could be made, and the premium, to shew, as the plaintiffs contend, that the risk contemplated was something more than that of a common sea risk. The plaintiffs likewise have produced the testimony of several witnesses, tending to prove a constant and uninterrupted traffic, except in certain instances, three or four, in British manufactures between *St. Thomas* and *Laguaira*; entries at the custom house, and public sale of goods of this description; this not only by the captain, but by several merchants who had sent adventures of British goods to *Laguaira*, which entered the port, paid the duties, and were sold, not clandestinely, but in open market, without any interruption or molestation, after all the decrees that have been spoken of; and the letter of the governor of *St. Thomas* tending to prove the same fact. These witnesses all declare that they had no knowledge of any prohibition, order, or decree. Let it be understood that ignorance of the law can form no excuse for the assured, because all who trade to any country, take upon them the knowledge of the laws of that country.

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If the seizure and condemnation were founded on the *Berlin* decree, adopted by *Spain*, and not on any domestic regulation of trade, commerce, revenue, or navigation, or some colonial restrictive system, but rest solely on these decrees, my opinion is, that it does not fall within the meaning of the warranty or exception. The illicit or prohibited trade which is excepted from the indemnity, would appear to me to be losses happening from a seizure and detention founded on some breach of the trade, revenue, or navigation laws, some municipal restriction or prohibitory regulation, which every nation possesses the right to make and to enforce by seizure and confiscation, not only within her territory, but on the ocean, at the distance from her territory at which this seizure was made, as a measure preventive of the infraction of her laws, affording an evidence of intention to enter a prohibited port, or with goods on board prohibited. The *Berlin* decree, and the *Aranjuez* adoption have not this complexion, but a very different one. In all the defences of, or apologies for, these atrocious decrees, and the correspondent British orders in council, it has not been pretended but that they were war

measures in the abstract, and originally unjust, and against the law of nations. Its justification by *Napoleon* is not as a measure of original right, but as retaliatory against *England*, disregarding the law of nations, and trampling on neutral rights. In *England*, her orders in council have, in her courts, been only attempted to be justified as retaliatory war measures; each nation asserting that this violation of the national law and neutral rights had for its justification, palliation, or excuse, some antecedent violation of those rights by her adversary, injurious to her; and all that was pretended by either was to force the other to return to, and abide by, the general law of nations; admitting the aggression, and justifying it by the unprecedented state of things, and by necessity, which knows no law. Thus, between them, the law of nations became a dead letter, a musty code, which was to form no rule in this new mode of warfare; the constitution of nations became extinct. Both the *Berlin* decree, and the Spanish adoption are declared to be necessary war measures against *England*. The decree thus concludes. "The provisions of the present decree shall be abrogated and null in fact, as soon as the *English* abide again by the principles of the law of nations." The Spanish decree, in speaking of the principles of the *Berlin* decree, declares them to be "principles of reprisals to put an end to a desolating war, and to obtain a solid peace, and that their co-operation is sanctioned by the rights of reciprocity." And in the case of the *Acteon*, Sir *William Scott*, 1 *Edwards*, 255, observes, "*France* has fulminated her decrees against the commerce of the whole world, and has compelled this country, defensively, to have resort to measures which, abstractedly and originally, would be unjust in the highest degree." And, again, in the case of the *Fox*, 314. "The orders in council are retaliatory orders; they are so declared in their own language, and in the uniform language of the government, which has established them. I have no hesitation in saying that they would cease to be just, if they ceased to be retaliatory, and they would cease to be retaliatory from the moment the enemy retracts in a sincere manner those measures of his which they were intended to retaliate. Their establishment was doubtless a great and signal departure from the ordinary administration of justice in the ordinary state of the exercise of public hostility, but was justified by the extraordinary deviation from the

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*Philadelphia.* All these extraordinary decrees and orders in council, are thus declared by *France*, and by *Spain*, and by *England*, to be aggressions of a hostile nature, public hostilities, and so far as they operate on neutrals, are contrary to the law of nations ; and as they affect the interest of the *United States*, are so declared by our own government, affording a just ground for war, and in fact producing war. The *Berlin* decree, by the order of *Napoleon*, was communicated to his allies, the kings of *Spain*, *Naples*, *Holland*, and *Etruria*. His communication was equal to a mandate, a command to adopt this decree : thus identifying the French empire and the nations attached to the political system of *France*. I cannot see in these decrees a prohibition of trade in British manufactures, as a mere municipal, territorial regulation, a colonial system of exclusion ; but I do discern, in every feature, member and limb, acts of declared public hostility, as means to put an end to a desolating war, and produce a solid peace. I search not for concealed motives, when I find open and avowed declarations.

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This agreement, like all others, is to be construed according to the intention of the parties, and the subject matter of the contract. This clause was first introduced into policies, as has been stated, in 1788, long before this new and unprecedented state of things, which the wisest man could not have foreseen. It could not be the object of the most cautious insurer to guard against the most improbable of all human events. The indemnity extends to every seizure and detention and loss occasioned by belligerent measures, (and not authorised by the general law of nations,) which this is. The exception excludes from indemnity, all losses, &c. occasioned by any illicit or prohibited trade, under any municipal territorial regulation ; which this is not. I cannot subscribe to the opinion, that the *Aranjuez* decree has a double aspect, and may be viewed either as a belligerent measure or a domestic regulation ; for it declares what it is, in its own language,—a retaliatory war measure ; a reprisal on the enemy ; a co-operation with the head of a confederacy against that enemy. Nor can the place of exercise of this act of public hostility change its nature, or give validity to that which was void *ab initio*, so far as respected neutrals ; there could not be, if I may use the expression, the constitutional exer-

case of an unconstitutional power ; but the whole article in the 1818. decree which gives rise to the present controversy, whatever *Philadelphia.* may be said of other parts of it, is against the law of nations, as it made goods of *British* manufacture, prize, every where and in the possession of every body ; on the sea and on the land.

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I have reflected on this subject with great anxiety ; it is said to be of the first impression, and it certainly is of the first importance. I give my opinion with unaffected diffidence, increased by the consideration, that it is the first case, which, sitting alone, I am called on to decide. My consolation is, that no party can be injured if I have fallen into error, as this cause will receive the final decision of a full Court in Bank, and if there be error, it will be there rectified, and justice done to the parties. It is for this purpose, I have met the question fully and fairly, and decided it according to my best judgment.

The defendants contend, that the seizure and condemnation were not solely founded on the *Berlin* and *Aranjuez* decrees ; but on the general colonial system of restriction, or some other *Spanish* ordinance. The facts stated in the sentence are not now conclusive evidence in this state, but they are *prima facie* evidence to stand for proof till the contrary appears, casting the burthen of proof on those who allege their falsehood. The legal presumption is in their favour, but this, like all other presumptions, may be destroyed by direct evidence or by an accumulation of circumstances tending to shew a state of things totally inconsistent with the facts stated. It is contended by the plaintiffs, that there is no *Spanish* decree other than that of the 19th *February*, 1807, excluding goods of *British* manufacture under penalty of confiscation. They say as far as the non-existence of any alleged fact can be proved, they have proved it, and they rely on the depositions of five witnesses. The testimony has been so often stated by the counsel on both sides, as to render the repetition by me useless. The letter of the governor of *St. Thomas* is said also to afford strong evidence. The letter states, that *Faukel & Stackman* had always conformed to the regulations enacted in those ports, and had paid considerable sums into the coffers of his catholic majesty, in order that their trade and commerce might thereafter be continued without interruption, and that they had, as usual, sent out the schoo-

1818. *ner Antoinette*, and that she was seized under the pretence, *Philadelphia*, that there were *English* manufactures on board, prohibited by the regulation of *Madrid*, of which regulation nobody in his government had the slightest intimation.

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To prove the existence of such regulation, *Mr. Cornel* was examined on the part of the defendants. His testimony has been already stated. It certainly would have been satisfactory to have found inquiries made for these *Spanish* orders, and if they could have been produced, to have had them in evidence; if not, some account should be given of their date and extent. To afford an opportunity for this purpose, was one of the reasons for granting the new trial, and though nearly two years have elapsed since this intimation was given by the Court, no step appears to have been taken on the one part or the other. In this both have been deficient. The defendants, if such royal orders had existed, could have procured authentic copies of them; at least have examined witnesses to prove their existence and contents. The plaintiffs could have examined witnesses, if not at *Laguira* or *Porto Cabello*, at which places they say it was impracticable, owing to the distracted state of the country, witnesses in *Old Spain* whose situation gave them an opportunity of examining the Spanish records. If such royal orders exist it was a fact capable of demonstration, and as their existence had been called in question, and witnesses examined, who had some opportunities of knowledge residing within three days' sail of the place where they must have been promulgated, and as the official letter of the governor of *St. Thomas*, complaining of these seizures, questioned in polite terms the existence of such royal order, I cannot account for the inattention on the part of the defendants in procuring positive proof of some kind to prove their existence. The testimony of *Mr. Cornel* establishes nothing to this effect. There is a due respect to be paid by you to the sentence so far as it states a royal order or orders on which the decree is founded. The testimony on the part of the plaintiffs, accompanied with the total absence of positive proof of any royal order except that of *Aranjuez*, more especially as they were warned of the propriety if not necessity of producing on another trial, some other evidence than the sentence itself, are matters which must be left to you to weigh and consider as opposed to the facts stated in the decree. It is your peculiar province to

determine on the existence of such royal order. The sentence, however, is to stand for the proof of the fact, unless its credit is impaired or destroyed by the evidence produced on the part of the plaintiffs, and by the defendants not producing any evidence corroborative of this, so capable as it is of proof. With stating to you the concluding observations of governor *Schoffen* in his letter to the captain general, I will leave the fact for your decision ; it is this :—" You will permit me to remark, that the governors of the French colonies have never until now confiscated neutral goods consisting of English manufacture, although the proclamation of *France* preceded that of *Spain* by several months." It is evident from this, that the *Aranjuez* decree, was known at *St. Thomas*, though all profess a total ignorance of any other royal order confiscating British manufactures. If such order prohibiting as illicit all trade to these provinces in goods of English manufacture did not exist, the cause is with the plaintiffs. It is not now pretended to be an order of 25th *June*, 1806, but one of 25th *August* ; but what is this ? Is it stated in any part of the sentence to be an order prohibiting the importation of British manufactures ? If it did, the case of the defendants would be much stronger than it is ; but it is requiring a great deal to call on you to say in the first instance there was a decree of that date ; and then to conjecture what it was ; and that it was an order prohibiting all trade in those articles. The condemnation was not as was supposed on the motion for a new trial, on a royal order of the 25th *June*, expressly prohibiting the importation of British manufactures ; this arose from a mistake in the translation of the proceedings of the council of *Porto Cabello*. The violation of the royal order, if there be such a one, of the 25th *June*, prohibiting the importation of these goods, is not assigned as the cause of condemnation ; but the cause assigned is the *Berlin* and *Aranjuez* decrees, and some other royal order or orders, of the contents of which we have no knowledge, and it is assigned in the words of the *Berlin* decree which we very well know.

It remains, however, to be considered in another point of view ; for what cause was this seizure and condemnation ? Not for being concerned in an illicit or prohibited trade, but because the property condemned, was of British manufacture. It is a matter worthy of much consideration, that the

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cause of condemnation is assigned in the express words of the 5th article of the *Berlin* decree, by which the produce of English manufactures is declared to be lawful prize. "The council did declare, and do declare, as having been lawfully detained, the schooner *Antoinette*, and that the goods and effects found by the surveyors to be English manufactures, are lawful prize." Thus conforming nearly verbatim with the *Berlin* decree, on which decree, the imperial decree, among other decrees, this adjudication is founded. If there was a Spanish decree, royal order, or act of the captain general, prohibiting the importation of British manufactures, this is not assigned as the cause of confiscation; and when the sentence declares, in the words of the *Napoleon* decree, it to be a condemnation, because the goods were of English manufacture, and, therefore, lawful prize, can the Court, can the jury say, that the seizure was for another cause, and under some other decree? By the act of assembly of 29th *March*, 1809, the sentence still remains as conclusive evidence of the acts and doings of every foreign prize court. Is it a charge of trading in prohibited goods, entering into a prohibited port, infracting any colonial regulation, or of a design or attempt so to do? Does the finding of this foreign prize court state such act or design, or any act or attempt in contravention of any territorial municipal regulation, a violation of any trade or navigation act?

I cannot find in any subsequent part of these proceedings, any new condemnation for any new cause, not stated in the sentence. They are convicted of being goods of British manufacture, and, therefore, lawful prize.

The opinion of the auditor, I am desirous of treating with all respect; yet I must confess, I cannot give to it all that full faith and credit we are desired to do; because it partakes more of an invective against the enemy; a justification of the resort to every expedient to distress him; than a judicial opinion, founded on any Spanish royal order, other than that of *Aranjuez*; for after some abuse of the Spaniards concerned in this trade, that gentleman thus breaks out, "but none of these causes will prevent your excellencies from encouraging the persons engaged in cruising, in detaining every vessel bound to ports on this continent, should the cargoes contain any portion of goods manufactured by the tyrants of the sea, and the sacrilegious invaders of the

rights of peace as well as of war." It is true, he states that the captain endeavoured to introduce the goods by surprise, but is the condemnation for this? It is true, he has stated that they were smugglers, but is the condemnation on this account? Because, says he, it appears from the proceedings in this case, that there have been published in *North America*, in the usual form, by the public papers, the imperial decree and the royal order of the 19th *February*, 1807, which fact argues against all the captured parties, and convicts them of smuggling. Strange conclusion from such premises.

"Agreed to by the council, and it conforms to the literal meaning thereof, and orders what is there recommended, to be carried into execution." But does this amount to a new condemnation for a new offence? Which of these allegations of the auditor is found by the council? Is it because the goods are goods of enemies; because they were attempted to be introduced by surprise; because they were smuggled; or because they were of British manufacture? If we look in that place where it ought to be found, the sentence, we are not left to conjecture, it is because of their being goods of English manufacture.

They had already been condemned, for this specific reason, by the sentence of 24th *June*, and the doings of 24th *July* do not revoke that sentence; this proceeding of *July* cannot be considered as a new condemnation for another and for a different offence. The division of the proceeds of sale the same. The recommendation of the auditor as was contended by the defendants' counsel, on the argument on the admissibility of their papers, was a suspension of the distribution, until the owners of the privateer gave security to abide by the determination of the supreme tribunal of the admiralty.

The language of the sentence seems to import any thing else than a condemnation on account of illicit trade. The council convened to determine the legality of the capture of the Danish schooner *Antoinette*, captured by a privateer, and the goods are declared to be lawful prize, being of English manufacture, and the distribution is made according to an ordinance for the regulation of privateers; one tenth to the admiralty for the duties, and nine-tenths to the privateer's men; an allowance most liberal indeed, for a mere seizure,

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1818. for an offence committed against a municipal regulation, and more resembling the distribution of booty, than the appropriation of a penalty.

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There is abundant evidence to shew, that these ports were not closed against the Dames, in the decree itself, and in the governor of *St. Thomas's* letter, stating that Messrs. *Fauvel & Stackman*, proprietors of the schooner *Antoinette*, from the first moment the ports of this province were opened, had hastened to trade and had continued to trade there. It is, therefore, my opinion, that this seizure and condemnation, were not on account of illicit and prohibited trade, but it is to be considered as a maritime capture *jure belli*; and the sentence is in conformity to the *Berlin* and *Aranjuez* decrees, of which I have already declared my opinion.

The jury found a verdict for the plaintiffs for 12115 dollars; and the case now came before the Court on a motion by the defendants for a new trial;

*First*, because the charge of the Court was against law.

*Secondly*, because the verdict was against evidence.

*Hallowell, Levy, and Lewis*, for the defendants. On entering into the present contract of insurance, the defendants accepted all risks arising from capture or seizure in port, for or on account of any illicit or prohibited trade; and to this exception the plaintiffs acceded. When the insurance was made the agents who effected it, either were or ought to have been acquainted with all the edicts, known in the *United States*, prohibiting trade in *British* manufactures; and it was their duty to communicate to the company, that the goods they were about to insure were of this description. This, however, was not done. It is confessed, that the goods which were the subject of this insurance were of *British* manufacture. The decree by which they were condemned proceeded upon this ground; declaring the trade in such articles to be illicit and prohibited. Whether the prohibition arose out of a decree, a royal order, an order of the governor and captain general of the province, or the general established colonial policy of *Spain*, is immaterial; provided the trade in which they were embarked, appear to have been in contravention of the laws of *Spain* or her provinces.

It has always been the permanent system of *Spain* to exclude all foreigners from the ports of her colonies. They were permitted neither to carry goods there, nor to take them away, unless they were partners in a *Spanish* house, or the property was shipped in *Spanish* bottoms. She has, it is true, under peculiar circumstances, and particularly when pressed by a superior naval power, been compelled to depart from this policy, which, nevertheless, has always been her fixed and standing policy. In time of peace, it has always been pursued with unvarying rigour; nor is it in time of war relaxed of course, for it is then necessary for a neutral to procure a license to trade with the *Spanish* colonies. 2 *Rob. Hist. Amer.* 360. 4 *Rob. Ady. Rep. appx.* 5. 8, 9. *Livingston v. Maryland Insurance Company.* (a) If therefore we had shewn no particular decree authorising the condemnation of goods of *British* manufacture imported in neutral bottoms, we should have done enough in shewing the general colonial system adopted by *Spain*, leaving it to those who allege a relaxation of that system to shew it. This policy did not derive its existence from the state of things growing out of the *French* revolution. It existed before the year 1788, when the clause respecting illicit trade was first introduced into policies of insurance in this city. It follows, that independently of any particular decree or order, the *Antoinette*, sailing from *St. Thomas* to *Laguaira*, would have been condemned under the established system of *Spain*. But it is not necessary to resort to this argument. The decree of condemnation speaks of an edict of 26th *June*, 1806, of the Captain General and Intendant of the *Caraccas*, opening the ports of that province to foreigners, on the express condition, that *British* manufactures should not be introduced. This edict is referred to, and the condition on which the ports were opened declared in several parts of the auditor's argument. A power was probably granted by the mother country to the governors of her *South American* provinces on the first establishment of the colonial system, authorising them to open their ports to foreigners, whenever they deemed it expedient. This power was in the highest degree necessary to enable the colonies to obtain supplies before they could be furnished from home. But whatever may have been the authority

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(a) 7 *Cranch*, 506, 7.



1818. with which they were formally clothed in relation to this subject, it is notorious that they frequently exercised it. *Philadelphia*. The decree of condemnation refers to four public acts. 1. The decree of *Aranjuez*. 2. The decree of *Berlin*. 3. A royal order of 25th *August*, 1806. 4. A decree for opening a free trade with the allied powers. Any one of these would have been a sufficient ground of condemnation. When the sentence of the Court passed, not one of these decrees was a year old, except that of 26th *June*, 1806, which opened the ports to the allied powers, and at the same time prohibited a trade in *British* goods. Of the existence of this order of 26th *June*, 1806, on which the sentence of condemnation was founded, the Court ought not to entertain a doubt; for if the averment of its existence in the sentence of a foreign Court be not sufficient proof of that fact, it would be necessary in some instances to go to the most remote parts of the world for original orders, which, in all probability, could not be obtained. It is at least *prima facie* evidence, and nothing has been adduced to contradict it. No witness has declared, that the trade in *English* manufactures was lawful; they have merely stated, that at certain times such merchandise was admitted to entry, and sold. One witness has declared, that he was informed the *Berlin* decree had been proclaimed by beat of drum, and that although goods seized as *British* manufactures were acquitted at *Laguaira*, they were condemned at *Porto Cabello*. This merely proves the prevalence of corruption at *Laguaira*; not the non-existence of the prohibitory order. The dispensing with the regulations of trade by custom house officers and others, affords no evidence of their having been abrogated; nor does it at all legalise acts done in contravention of them. *Morck v. Abel*. (a) *Church v. Hubbard*. (b) Whether the order in question was a royal order, or one of the Captain General and Intendant, is a matter of no consequence, because the authority of that officer within the province is equal to that of the king. In *Tucker v. Fuhel*, (c) the condemnation was under an order of the governor of *Antigua*, for opening the ports under certain restrictions to *American* vessels, which was afterwards revoked by the same authority. Nor can the circumstance of the capture having been made by a privateer alter the character of the decree, or

(a) 3 *Bos & Pull*. 37.(b) 2 *Cranch*, 234.(c) 1 *Johns. Rep.* 20.

afford any argument, that it was not municipal in its nature. 1818.  
It is the custom of all nations to permit such laws to be enforced by any of their armed vessels. Our own non-intercourse law of 1st March, 1809, which was purely municipal, authorised seizures by any armed vessel of the *United States*.

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Putting out of view the order of 26th June, 1806, the decree of *Aranjuez* makes this trade illicit within the meaning of the clause in the policy. The seizure was not on the high seas, but within the jurisdiction of *Spain*, not more than half a league from *Macuto*, where by municipal and national law she had a right to make the seizure. By the 5th article of the *Berlin* decree of 21st November, 1806. "The trade in *English* merchandise is forbidden. All merchandise belonging to *England*, or coming from its manufactories and colonies is declared lawful prize." This decree was adopted by that of *Aranjuez* of 19th February, 1809. On principles of national law, *Spain* had a right to establish these regulations, and the Courts of all countries are bound to recognise them. The question, however, is not whether they were legal or not. The object of the underwriter in introducing the warranty against illicit trade was security from loss on account of prohibitory laws of any kind; and the terms of the policy render unnecessary all inquiry into the competency of the government to establish such laws. It has been argued, that the decree of *Aranjuez* is void, in consequence of being of a belligerent character. Admitting it to be so for some purposes, it does not follow, that it is altogether void. It may be valid in part, and void for the rest. Valid in its infra-territorial, void in its extra-territorial operation. *England* is almost perpetually at war, and all her decrees are in some respects of a belligerent nature, which, according to the doctrine contended for, would make them void even where they prohibited trade.

It has been objected that the clause in question was introduced into the *Philadelphia* policies in the year 1788, before the French revolution, and, therefore, it is argued that it could not have been intended to guard against the violent aggressions on neutral commerce, which followed that event. This would be a very dangerous rule, by which to construe the clause. Though a statute recite a particular mischief, yet if the words be general, they are not to be restrained to

1818. that mischief alone. *Copeman v. Gallant*.(a) 6 Bac. Ab. 381. *Grwill. notes*. The loss in this instance arose from an illicit or prohibited trade, and though it may not have been of the description contemplated at the time the clause was introduced, yet that clause having been adopted by the parties, and the loss coming within the broad words of it, it ought to receive a liberal construction in favour of the underwriter, for whose benefit it was introduced. The assured had witnessed the aggressions on neutral commerce from the time of *Robespierre*, until it was completely trampled under foot, and at the time this policy was underwritten, these aggressions were at their height. Can it then be supposed that the parties to this contract had in view merely what was contemplated nineteen years before, when this clause was first introduced? Impossible. The decree of *Aranjuez* expressly prohibited trade in British manufactures, and the reasons and grounds of this prohibition, this Court cannot investigate. *Speyer v. New York Insurance Company*.(b) We do not, however, deny that a seizure by a Spanish privateer of a vessel having on board English goods, on the *high seas*, not bound to a Spanish port, would not have been within the warranty; but where it takes place in port, although under a decree, belligerent in its nature, but prohibiting the trade, the insurer is protected. The 7th article of the *Berlin* decree, a decree decidedly belligerent, in most of its aspects, declares that no vessel, coming directly from *England*, or from the English colonies, or having been there since the publication of the decree, shall be received in the ports of *France*; yet it was declared by the Court, in *Mumford v. Phanix Insurance Company*,(c) that seizure for trading, or attempting to trade, at *Cherbourg*, contrary to the *Berlin* decree, would bring the case within the reach of such a warranty as this. Independently, however, of this clause, the defendants would not have been liable for a loss by illicit trade, unless they had expressly insured against it, or had known at the time of subscribing the policy that the trade was illicit. *Richardson v. Marine Insurance Company*.(d)

The non-disclosure that the goods were of British manufacture, was an important concealment, which vitiates the

(a) 1 P. Wms. 330.

(b) 3 Johns. Rep. 94.

(c) 7 Johns. Rep. 461.

(d) 6 Mass. Rep. 111.

policy. It was the duty of the assured to communicate every circumstance which would subject the property to condemnation, whether the condemnation be lawful or unlawful. *Sperry v. Delaware Insurance Company.*(a) *Kohne v. Insurance Company of North America.*(b)

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*Binney and Ingersoll*, for the plaintiffs. The facts ought now to be considered as pretty well established. Two verdicts ought to settle facts, except in flagrant cases. As to the law, the assured have the opinions of two Judges in their favour, viz. Judge BRACKENRIDGE on the former, and Judge DUNCAN, on the last trial. The opinion of the commercial world is also in their favour. No underwriters have successfully resisted a claim for seizure under the *Berlin* decree, and yet many millions of dollars have been lost under it.

It is alleged, now, for the first time, that there was a fraudulent concealment which avoided the policy. The objection comes too late. The policy was signed in the month of *June*, 1807, and, until this moment, no complaint has ever been made of an improper concealment. But the plaintiffs were under no obligation to inform the company that the goods were of British manufacture. If there was a municipal regulation prohibiting the introduction of such merchandize, the assured assumed all the losses arising from such a cause; and if there was not, the property was not liable to seizure. With respect to the danger of being seized, right or wrong, under the *Aranjuez* decree, it is sufficient to say that the plaintiffs knew nothing of its existence when the insurance was made. This was the first capture under the *Berlin* decree, which was adopted by that of *Aranjuez*. The defendants, however, knew of this decree, and it was their duty to inquire into the character of the goods, unless they intended to insure them, whatever might be their character. 1 *Marsh*. 397. What the insured did not know, they were not bound to communicate. Nothing but a fraudulent concealment would have vitiated the policy. [The Court here declared that it was too late for the defendants to say any thing on the point of concealment.]

It was referred to the jury, upon the whole evidence, to

(a) 1 *Marsh*, 81. (*Cond. Ed.*) note,

(b) 6 *Binn*. 219.

1818. say whether any local decree against British goods existed. *Philadelphia.* There was evidence of great weight laid before them on both sides, and the Judge who tried the cause is not dissatisfied with the verdict; in such a case the Court will not disturb it.

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The Spanish colonial policy has been repeatedly adverted to, and insisted on, in the course of the opposite argument. This has no connexion with the cause. The policy of *Spain* has been, in peace, to exclude foreigners; in war, to admit them. In time of war the presumption is, that the ports were open to British goods brought by neutrals, for *Spain* wanted supplies, particularly of clothing, which she could not supply herself, and which were almost always furnished by *England*, who could afford them cheaper than any other nation; and it is notorious, that the *United States* have carried on commerce with *South America* to a great extent in merchandise of this kind. No evidence has been exhibited of the existence of a Spanish law, prohibiting English goods, except the record of the council of *Porto Cabello*, of which the Court had, on the former trial and argument, a very defective translation. The first part of this record sets out the sentence of condemnation of 24th *June*, 1807; then follows the meeting of the council; their reference of the subject to the auditor, and his opinion, at the conclusion of which he advises the Court to refer the matter to the supreme tribunal of the admiralty, to which they agree. Several decrees, orders, and acts, are referred to in the auditor's argument; but it is full of ambiguities, and it does not appear precisely on what grounds the condemnation took place. It therefore furnishes no evidence of the existence of any municipal regulation forbidding the trade in which the *Antoinette* was engaged. What a Court has actually decided is evidence, but the facts they assert as the foundation of their decision are not evidence. *Peake's Ev.* 72. *Phill. Ev.* 248. *Maley v. Shattuck.*(a) *Marine Insurance Company v. Hodgdon.*(b) It is admitted, that the assured are bound by the first sentence of the Court at *Porto Cabello*, but before they can be bound by the second sentence, it is necessary to know what it was. Nothing more was done than to agree to refer the case to the supreme tribunal. Either the first sentence was complete

(a) 7 *Cranch*, 548.

(b) 6 *Cranch*, 219.

and final, or it was repealed by the subsequent proceedings, **1818.** and then there was no sentence at all, for those proceedings *Philadelphia.* do not amount to a sentence.

The decree of 25th *August*, 1806, was only for the distribution of the prize, viz. one-tenth to the king, and the remainder to the captors. The decree for opening the trade with the allied powers we know nothing of; the auditor does not explain it. The order of 25th *June*, 1806, was the act of the captain general. An act is a temporary order different from a decree; this, therefore, could not have been the decree for opening the trade to the allied powers mentioned by the auditor. That no prohibitory decree was known at *St. Thomas* is proved by five witnesses, and by the letter of the governor of that island to the captain general of *Caraccas*, which moreover says that these vessels were seized by virtue of the regulation of *Madrid*, (probably the *Aranjuez* decree,) of which they had no notice. The laws of the country must be supposed to be equally known to all the parties to the policy; and where the insured and the underwriter are mutually ignorant of a prohibition of trade, the underwriter must pay the loss. *Livingston v. Maryland Insurance Company.*(a)

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From the whole evidence it does not admit of a doubt, that the capture and condemnation were under the *Berlin* decree, which is not within the clause in the policy. This clause was first introduced into the *Philadelphia* policies in the year 1788, and from them it was copied into other policies in this country, but is not to be found in those of *Europe*. At that time the world was at peace, and no anticipation could have been formed of the extraordinary events which occurred in 1806, and subsequently. When the owner took upon himself the risks resulting from prohibited trade, they were within limits well known to him, but he never intended to assume risks arising from a state of war, and from edicts published under the pretended authority of the law of nations. The mischief was, that insurers were then held to be liable for loss in consequence of smuggling, at least where both parties were ignorant of the prohibition of trade; for it was held, that the underwriters were bound to know, that the trade was illicit, and if a seizure took place they were bound to pay the loss. 1 *Marsh.* 60, 61. 474. 1 *Emerig.* 212.

(a) 7 *Cranch*, 548.

1818. *Livingston v. Maryland Insurance Company.*(a) *Buchanan v. Delaware Insurance Company.*(b) It is against the spirit of the contract of insurance, the object of which is to afford protection against almost every description of loss, to fritter it away to almost nothing, and throw the loss upon the assured. The interpretation given to this clause by the opposite counsel, is to exclude almost all the important risks; for if the underwriters are not responsible for losses springing out of war decrees, they are responsible only for sea risks, which never could have been the intention of the parties, and is contradicted by the premium, which is double what would have been sufficient to cover sea risks only. Where it has been the intention of the parties, to exclude from the policy, losses by seizure in port, and seizure under the decrees of *Napoleon*, and his allies, by being turned away by a blockading squadron and the like, a clause has been introduced expressly for that purpose. *Duval v. Commercial Insurance Company.*(c) *Black v. Marine Insurance Company.*(d)

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The terms of this clause have a special relation to commercial regulations. The parties are merchants, and if the words are ambiguous, they are to be interpreted in a commercial sense. 1 *Marsh*, 347. *Sleight v. Hartshorne.*(e) *Coit v. Commercial Insurance Company.*(f) Seizure and detention do not imply capture from belligerent causes. The plain intention of the warranty was, to protect the underwriters from losses in consequence of municipal commercial regulations. No seizure which is not justifiable by the laws of the port, for regulating foreign commerce, is within this warranty. *Church v. Hubbard.*(g) *Richardson v. Maine Insurance Company.*(h) A seizure under a decree, claiming to be justifiable by the laws of nations and of war, cannot therefore be within it. No case can be shewn where the underwriter has been held to be discharged from a seizure under the *Berlin* decree, nor can any *dictum* even of a judge, be adduced in support of such a position. A blockade of the port of destination, and an embargo, are prohibitions of trade, yet in such cases the insurers are liable; and the case

(a) 7 *Cranch*, 548.

(b) 3 *Serg. & Rawle*, 74.

(c) 10 *Johns. Rep.* 278.

(d) 11 *Johns. Rep.* 287.

(e) 2 *Johns. Rep.* 540.

(f) 7 *Johns. Rep.* 390.

(g) 2 *Cranch*, 236.

(h) 6 *Mass. Rep.* 114.

of *Kohne v. Insurance Company of North America*, (a) proves 1818.  
 that they are answerable for a loss by capture by the British, *Philadelphia*-  
 for trading between the Spanish colonies and the mother-  
 country, which *Great Britain* had prohibited. The *Antwerp*  
 cases were subsequent to the *Berlin* decree, the ships sailed  
 with a full knowledge of it; they were laden with colonial  
 produce, and had been carried into *England*, or had touched  
 there; they were taken within the *Schelde*, and the officer  
 declared he took them under the *Berlin* decree; yet the point  
 now made was never raised, because it was never supposed  
 that the *Berlin* decree, was a prohibition of trade within  
 the meaning of this warranty. *Bohlen v. Delaware Insurance*  
*Company*, (b) *Brown v. Phoenix Insurance Company*, (c)

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The ordinance under which the seizure in the present case  
 took place, was against the law of nations, and to such a  
 seizure the warranty has always been held not to extend.  
 There must be both a seizure and an illicit trade. *Graham v.*  
*Insurance Company of Philadelphia*, (d) *Hubbart v. Church,*  
*S. C. U. S.* There never was a prohibition of British goods  
 prior to the *Berlin* and *Aranjuez* decrees. There had always  
 been an open trade between *St. Thomas* and *Laguaira*, in  
 such articles, which entered at the custom-house without diffi-  
 culty. When the *Antoinette* sailed, the trade was supposed  
 to be open. She was not proceeding to *Laguaira* clandes-  
 tinely, but openly, with a cargo bearing the marks of the  
 British market, and the whole evidence proves, that no de-  
 cree or order, forbidding commerce in British goods was  
 known. The *Antoinette* and the *Sea Nymph*, were the first  
 vessels captured after the adoption of the *Berlin* decree by  
 that of *Aranjuez*, and they must have been condemned under  
 that decree. This decree was a war measure, founded con-  
 fessedly on the law of nations. It was a war against English  
 manufactures, wherever found, and authorised them to be  
 seized as lawful prize. It was a military reprisal, violating  
 the rights of neutrals, though one article of it, viz. that  
 which forbade vessels coming from *England* to enter the  
 ports of *France*, was of a municipal nature. The terms used  
 in this decree shew its character. *Lawful prize*, is either  
*jure belli*, or under the law of nations, and never can apply

(a) 6 Binn. 219.

(b) 4 Binn. 430.

(c) 4 Binn. 445.

(d) 1 Marsh, 346, 7. (Cond. Ed.) notes.



1818. *Philadelphia*. to seizures under revenue laws. All proceedings under this decree, have been in prize courts, treating the seizure as a military reprisal. Prize is where a vessel is seized in war. 1 *Emerig.* 440. The question of prize, is determined by the law of nations. 2 *Phill. Ev.* 249. The French and British courts, as well as their diplomatic correspondence, and official reports, have uniformly treated the French decrees and British orders in council, as measures of retaliation, unlawful in the abstract; each nation justifying herself by the alleged aggression of the other. *The Acteon*, (a) *The Fox and others*, (b) 1 *Edw. Appx.* 11. 67. 81. Whether the operation of this decree was within or without the Spanish territory, it was unlawful. *Spain* could not lawfully capture British goods belonging to neutrals as prize, although she might prohibit their importation, and make them liable to forfeiture. But this decree does not prohibit their importation. Supposing it, however, to be in part municipal, it was not executed under its municipal aspect, but its military one. That the property was taken as enemy's property, is proved by the whole sentence, and particularly by the distribution which was ordered to be made. It is impossible that the government should have received one-tenth only, if the seizure had been for a breach of the revenue laws. Besides, all governments inflict penalties upon the captains of vessels who introduce prohibited goods, in addition to confiscation, and generally condemn the vessel. *Price v. Bell*, (c)

The cases cited on the other side, do not at all contradict the doctrine now contended for. *Speyer v. New York Insurance Company*, was the case of a vessel denied an entry; and in the case of *Mumford v. Phoenix Insurance Company*, the condemnation was on the ground of a false declaration of the captain, that his vessel had not been in England. It was, indeed, said by KENT C. J. "that seizure for prohibited trade, under the *Berlin* decree, would have brought the case within the warranty." But this point did not arise in the cause, and was not decided by the Court.

TILGHMAN C. J. The insurance in this case, was on goods, shipped on board the schooner *Antoinette*, from St.

(a) 1 *Edw.* 255.

(b) *Id.* 314.

(c) 1 *East*, 663. 668.

*Thomas*, to *Laguira*, "warranted by the assured, free from any charge, damage or loss, which may arise, in consequence of the seizure or detention of the property, for, or on account of any illicit or prohibited trade." The schooner was captured by a Spanish privateer, on the 18th June, 1807, within little more than a league from *Laguira*. The captors carried her to *Porto Cabello*. There proceedings were instituted in the court of admiralty, against vessel and cargo, in consequence of which the plaintiffs lost their property. The nature of these proceedings I shall mention more particularly hereafter. Suffice it to say, at present, that the reason assigned by the court, in justification of the capture, was, that the goods were of *British manufacture*. The king of *Spain*, had, by a royal decree, of the 19th February, 1807, at *Aranjuez*, adopted the decree of *Berlin*, made by the emperor of *France*, on the 21st November, 1806. Whether there was not also, another royal order of the king of *Spain*, or an order of his Captain General, and Intendant of the province in which *Laguira* was situated, prohibiting the importation of goods of British manufacture, is matter of doubt, and to afford an opportunity for ascertaining it, a second trial was granted in this cause. The doubt has not been removed by this trial, in which very little new evidence was produced. But, as the jury have again found for the plaintiff, which they ought not to have done, had there been any prohibitory decree or order, except that of *Aranjuez*, we must now take for granted, that there was no other. The question then will be, whether the defendants' warranty extends to the capture in this case; in other words, whether this was a seizure for illicit or prohibited trade, within the meaning of the warranty. That it is within the words of the warranty, is certain, for the decree of *Berlin* prohibits, in express terms, all trade in British manufactures. By the 5th article of that decree, "the trade in English merchandise is forbidden. All merchandise belonging to *England*, or coming from its manufactories and colonies, is declared good and lawful prize." But it is not contended, that *unlawful prohibitions* are within the meaning of this warranty. Neither is it contended, that the decree of *Aranjuez* was lawful, with regard to neutral nations, as to vessels not bound to *Spain* or her colonies. No belligerent has a right to say, that neutral nations shall not trade in the manufactures of his ene-

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1818. *may*. If such right existed, the commerce of all *Europe* and *Philadelphia. America* would have been suspended. For there was a time when *France* prohibited all trade with *England* or her colonies, and *England* prohibited all trade with *France* or her allies or any of their colonies. But the *United States* never acknowledged the legality of such prohibitions, neither did the underwriters ever assert, that they were protected by the warranty of the assured, against captures made in pursuance of orders which violated the law of nations. In *Kohne v. The Insurance Company of North America*, a case much contested, property belonging to a citizen of the *United States*, was captured under the British orders in council, because the voyage was from one of the Spanish colonies in *America* to old *Spain*. It was not pretended, that the case fell within the warranty, although the trade was prohibited by *England*. This warranty was introduced into our policies of insurance, a little before the French revolution, and was no doubt intended, to protect the insurers from loss, in consequence of an attempt to violate the commercial regulations of the country to which the vessel was bound. The decree of *Berlin* is no commercial regulation, but an extreme belligerent measure, intended to ruin *England*, by destroying her commerce and manufactures at the expense of the neutral nations. So far as it operated on the ocean, at a distance from the Spanish coast, the defendant's counsel give it up. But they say, that *Spain* had a right to confiscate all British manufactures found within her own territory. That she had a right to prohibit the importation of British manufactures, does not admit of a doubt. But the decree of *Berlin*, which she adopted, does not prohibit importation, but makes the goods lawful prize, wherever found. The capture, in the present case, was made, not merely because the goods were intended to be brought into the Spanish dominions, but because they were manufactured in *England*. They happened to be taken within less than a league of the Spanish coast; but it would have been the same thing, had they been taken in mid-ocean. The decree under which they were taken, made no difference; they were equally good prize in one place and the other. The case is not so strong, as if the goods had been seized in port. For, even if *Spain* had a right to confiscate them, when actually within her territory, it does not follow, that her cruisers had a right to seize them at sea, though

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near the coast, under a decree which contained no particular prohibition of importation, no regulation concerning the Spanish commerce, but a general declaration, that such goods, wherever found, were lawful prize. The proceedings in the Spanish court of admiralty are of a singular nature. The sentence of the 24th June, 1807, purports to be a decree of condemnation. Yet in the subsequent proceedings, of the 14th July, 1807, it is determined, that the record shall be sent to the supreme tribunal of prizes of the admiralty, by way of consultation, that it may be pleased to decide according to the royal will. So that considering the whole proceedings, the sentence of the 24th June, seems to be of the nature of an interlocutory order, and we have no evidence what the final decree was, or whether there ever was a final decree. But it appears plainly enough, from the report of the auditor, which was adopted by the Court on the 14th July, that there was very great dissatisfaction in the province, at the capture of neutral vessels under the decree of *Aranjuez*; and it also appears by the evidence, that in many instances goods of British manufacture had been permitted to be imported, that decree notwithstanding. Considering then, the hostile nature of the *Aranjuez* decree, in its general character; considering the nature of the warranty in this policy, which was intended to protect the insurers against seizure for breach of the laws of trade; and considering that these goods were seized at sea, and that they were subject to condemnation, not because they were about to be imported into the Spanish dominion, but because they were of British manufacture, I am of opinion, that the case is not within the warranty.

Another ground for a new trial, was taken by one of the defendant's counsel; that is to say, that the circumstances of the goods being of British manufacture, ought to have been disclosed to the insurers, because the risk was increased by it. That objection comes too late. The cause has been twice tried, without its ever being suggested, that the assured were guilty of an improper concealment. This affords a violent presumption, that in the opinion of the insurers, there was nothing to complain of. For aught we know, the information may have been given, and no evidence may have been offered at the trial, because neither party thought it necessary to say any thing on the subject. There would be no end

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1818. to new trials, if they were granted for defect in matters of fact, not thought material at the time of trial, and which, had they been mentioned, might have been proved. The Court ought now to presume, that the defendants have no cause for complaint, in point of concealment. Upon the whole, I am of opinion, that there should not be a new trial.

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GIBSON J. I concur. Whether any other decree than that of *Aranjuez*, prohibiting trade in productions of British manufacture, was in force at *Porto Cabello* at the time of the capture, was fairly submitted to the jury. It was a question of fact on which the jury have passed, and I am unwilling to disturb the verdict on that ground. The Judge who tried the cause intimated a strong opinion that the *Berlin* decree, adopted by that of *Aranjuez*, was the sole foundation of the condemnation. Can the correctness of that opinion be questioned? What evidence have we of any other decree prohibiting trade in British manufactured goods? The sentence states the condemnation to have been *conformable* to the act of the captain general of the *Caraccas*, the royal order of the 25th of *August*, 1806, and the *Aranjuez* decree of the 23d of *February*, 1807, including the *Berlin* decree. The royal order is conceded on all hands to have been a mere distributory regulation; and in no part of the sentence is it intimated that the act of the captain general is prohibitory of this trade. It is indeed said by the auditor, in his speech before the council, to be of that character: but I take this speech, for all purposes of legal evidence, to be no part of the proceedings of that tribunal. We can only look to the adjudicative part of the sentence, which is evidence of facts clearly and expressly there set out, but of none other. But if the whole of the speech were evidence, to what credit is it entitled? It was evidently got up on the occasion, to reconcile the people at *Porto Cabello* to this course of proceeding, (which appears to have been extremely unpopular,) by exciting their passions against *England*. It is impossible not to perceive that this was the intention. Shall we consider this declamatory harangue, full of sound and fury, as a recital of matter of fact? The auditor addressed himself to the passions, and with such an object to accomplish, what would he not assert? On the other hand, when it is considered that up to the time of the *Aranjuez* decree, goods of British

manufacture were freely admitted to entry in the ports of this province, and sold in open market; that the governor of *St. Thomas* was ignorant of any previous prohibition; that persons acquainted with the course of trade at *Laguaira*, were ignorant of it; the case with which it might have been proved if it really had existed; that the sentence of condemnation was as prize of war, and nearly in the words of that part of the *Berlin* decree that was applicable to the subject; and the inordinate proportion of the forfeiture allotted to the owners and crew of the privateer, we are precluded from believing that the sentence was grounded on any other decree than that of *Berlin*. It was the business of the defendant to make out to the satisfaction of the jury that the trade was prohibited within the meaning of the warranty or exception. This was not done, unless the *Aranjuez* decree be sufficient for that purpose. The existence of the act of the captain general has been shewn, but its purport has not been shewn: and it is too much to call on us to say the council proceeded under a law that we do not know to have been applicable to the matter before it, when another law is shewn within the purview of which the case directly falls.

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The condemnation, then, must be taken to have been under the *Berlin* decree. If that decree be contrary to the law of nations, the plaintiff ought to recover; for it is not sufficient that the trade be prohibited in fact; it must also be legally prohibited. There must be no infraction of neutral rights. A law, the enactment of which transcends the legitimate power of the sovereign who declares it, is merely void, and a seizure, under it, an act of unauthorised violence. Such a law was not within the view of the parties to this policy when the clause in question was introduced. Every sovereign has an absolute right of legislation, within his own territory, and his laws, operating within, and exclusively applied to the territory, are strictly municipal; although they may be, at the same time, belligerent measures; and on the latter ground, merely, it is not competent to neutrals to question their validity. Such were our embargo and non-intercourse laws, during our late contest with *England*. Foreigners entering the territory of a nation subject themselves to all the laws they there find in force, and a want of knowledge of the existence of such laws, or an evident impossibility of being able to obtain it, will not be sufficient to exempt them.

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But no country has a right, unless with respect to its own subjects, to give to its laws, an extra-territorial effect. On the high seas, the subjects of a power are under its legislative control; but the subjects of another power, never.

With respect to the *Berlin* decree, I perfectly concur with the opinion expressed in this cause on a former occasion by Mr. Justice YEATES, that it has a double character; as far as it was intended to operate within the territory of the sovereign declaring it, it is municipal; but as far as it was intended to operate on the sea, or in countries not subjected to his power by the destruction of the ancient government, and the substitution of one, not only actually but ostensibly under his direction and controul, it violated the law of nations, and was null and void. At the time of the seizure of the schooner, trade in goods of British manufacture, was legally prohibited within *Spain* and her colonies. I admit also, that for a meditated violation of that prohibition, *Spain* might legally seize such goods at any indefinite distance from her shores; and this, as a measure of preventive justice, not extending the operation of her municipal laws beyond her own limits, but one, as I take it, authorised by the law of nations, as being absolutely necessary to protect her municipal regulations from being infringed. But this decree was intended to operate on the land and on the water as far as the French or Spanish power to enforce it should extend. As to its contemplated extra-territorial effect it was void. Then in what aspect did the council of *Porto Cabello* apply it to the property condemned? Unquestionably, I think, in that aspect in which it was void. The condemnation was as prize of war. The council made no secret of the light in which it viewed the matter. By the decree in its valid character, the sentence was not warranted. The constituted authorities of *Spain* who acted on the subject, complain of no violation of the municipal laws of the country. Although, perhaps, the privateer might have seized, and the council have justly condemned the goods on that ground, they chose to rest on another; and a seizure or condemnation on illegal grounds is not the less a violation of neutral rights, because the property might have been confiscated under a law perfectly unexceptionable. It is the illegal pretension, that renders the seizure an act of lawless violence. It cannot be said that this was, in the language of the warranty, "a seizure and detention

for and on account of illicit or prohibited trade." It was a seizure as prize of war. *Spain* had a right, if she thought proper, to overlook the infraction of her municipal regulations; it was a matter between her and those who violated them. If she please to pardon, it does not lie with the defendant to say she shall not; neither will her having forgiven an injury justify her in inflicting another. No loss has been sustained in consequence of the infraction of the municipal laws of *Spain*. *Spain* by her tribunals has said so; and the defendant will not be permitted to allege the contrary.

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But were this decree valid in all its bearings, or even were this a condemnation under it in that character in which it unquestionably is valid, still I am not disposed to think it a law creating such a prohibition, as was within the meaning of the parties to this contract. I lay no stress on this clause having been first inserted during a state of peace, and before the existence of that unnatural state of violence which superseded the settled maritime laws and usages of nations; I pay much more respect to the opinions of commercial men. Where the meaning of a particular clause is doubtful, the usage that has prevailed on the subject, is the surest and safest interpreter of the intention of the parties. A blockade supported by an adequate force creates an interdiction of trade with the port or place blockaded, the validity of which has never been contested by neutrals; yet it never was supposed to be a prohibition within this clause. In all the cases of seizure in port by *Napoleon* under his decrees of this mixed character, I believe no underwriter of a policy containing this clause, has thought it worth his while to urge it as a defence. In fact we have, impliedly, the construction put on it by the several insurance companies of *Philadelphia*, in the unanimous resolution of their officers to provide specially in subsequent policies against responsibility for seizures in a French port, in consequence of the vessel having visited, or having been carried into a British port. This would have been unnecessary if this clause had been considered as sufficient to exempt from risk. It may be a difficult matter to lay down a general rule to govern in all cases the construction of the clause in question. I would say the prohibition must arise from a law exclusively municipal, (or in other words intra-territorial,) carrying with it no pretension of unwarrantable power in the sovereign enacting it. But whether



1818. *Philadelphia.* it be a standing peace regulation, or a temporary belligerent expedient, will be equally immaterial. The clause was originally introduced to exclude risk arising from a contravention of those laws, that the sovereign power of a nation had a right to enact without regard to the motives that led to their enactment; and I do not find, from the usage of the commercial world, its operation has since been either abridged or enlarged.

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The objection to the verdict on the ground of fraudulent concealment comes too late; it was not insisted on at the trial; and a party shall not be permitted to reserve for a motion of this kind a matter which he does not think proper to submit to the consideration of the jury. If he has been injured by the verdict in this regard, it is his own fault; we should never have an end of granting new trials if the rule were otherwise. But if the objection were made in time there is nothing in it. The plaintiffs, when they instructed their agents in *Philadelphia* to effect insurance, were ignorant of the existence of the *Aranjuez* decree, and could not foresee, that the peculiar character of the property would enhance the risk; and although that decree was known here when the policy was subscribed, it does not appear the agents knew the goods were of British manufacture. The principal will undoubtedly be affected by the acts of his agent; but fraud shall not be imputed, where neither the principal nor agent were separately in possession of all the facts, and which, when taken in the aggregate only, could vary the risk.

DUNCAN J. I will not load this case with a repetition of the opinion on the legal questions delivered by me in the charge to the jury, and shall content myself with a few observations on one branch of the case; *what is the cause assigned by the sentence for condemnation?* or, in other words, is the warranty, (warranted by the assured, free from any charge, damage, or loss occasioned, or which may arise in consequence of the seizure or detention of the property, for or on account of any illicit or prohibited trade,) negatived in the sentence? for I am confirmed in the opinion, for the reasons I have assigned in the instructions to the jury, that unless this is clearly expressed, or fairly to be drawn from the sentence, that the plaintiffs are entitled to recover; nay, I

would go further, for it is deeply impressed on my mind, 1818.  
 that if the sentence purports to be founded on several dis- *Philadelphia.*  
 tinct decrees, different in their nature, one of them of a bel-  
 ligerent aspect, and the other domestic, one respecting a  
 seizure of enemies' goods on board a friendly ship, or re-  
 specting a seizure and confiscation of the goods of a friend,  
 on board the ships of a friend, merely on the ground of their  
 hostile origin, as that they were of British manufacture, and  
 the other the prohibition of the importation of certain goods,  
 and the cause of condemnation is assigned in the very words  
 of the decree for confiscating the goods, because they were  
 of British manufacture, or because they were enemies' goods,  
 I would hold the condemnation to be on that decree, the lan-  
 guage of which is adopted in the condemnatory clause, and  
 consider the sole ground of the condemnation to be the cause  
 thus assigned; as in this case, because they were of British  
 manufacture. It would likewise appear to me, that if it were  
 even doubtful, from the obscurity of the sentence, (and from  
 its foundation resting on several decrees, or orders, with  
 different aspects, some of them in nature of seizure *jure*  
*belli*, and others merely regulations of navigation and trade,)  
 on which the condemnation was founded, it would not com-  
 port with justice, to pronounce that the condemnation was  
 for the latter cause, and thus by conjecture negative the  
 warranty, and strip the assured of that indemnity for which  
 he has paid.

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The principles laid down in *Park*, 365, have a striking  
 application. 1. If the sentence be so ambiguous and doubt-  
 ful, that it is difficult to say on what ground the decision  
 turned; or, 2. If the sentence on the face of it, be manifestly  
 against law and justice, or contradictory, the assured shall  
 not be deprived of his indemnity, because, to use the words  
 of Mr. Justice BULLER, any detention by particular ordi-  
 nances, which contravene, or do not form a part of the law  
 of nations, is a risk within the policy.

What is the express ground of condemnation? Goods of  
 British manufacture. That fact the sentence decided, and if  
 it can be collected from the sentence itself, on what ground  
 the foreign Court decided, that is conclusive. *Calvert v.*  
*Bovill*, 7 T. R. 526. Nor can the premises which led to such  
 conclusion, controul the sentence. In *Christie v. Secretan*,  
 8 T. R. 192, the court say, "We can only look at the ground

1818. of decision; that is, because the ship belonged to the enemies of the French republic, and cannot look at the previous reasons which are stated; among which were, that the ship was not documented according to the form of treaty, between the *United States* and *France*, and, therefore, not an *American* vessel, as that is not the ground of decision." If this was not the ground of decision, what was? If not for this, the cause is doubtful, ambiguous, and obscure, and it cannot be collected reasonably from the whole proceedings, that the condemnation was on account of illicit or prohibited trade. In *Bernardi v. Motteux*, *Doug.* 575, a policy on the ship *Jane*, warranted neutral, the only doubt was, whether the ship was condemned as enemy's property, or for violating a French *arret*, by throwing papers overboard. For one or the other of these causes, she was condemned. Yet the plaintiff recovered; because of the obscurity of the sentence, it not being certain, that the ground of condemnation was enemy's property. And in *Pollard v. Bell*, 8 *T. R.* 434, it is observed by Lord KENYON, "If contrary to justice the ship had been condemned, simply because she was not a Danish ship, we should have been concluded by the sentence, but as the courts abroad, have endeavoured to give other supports to their judgment which do not warrant it, and have stated as the foundation of their condemnation, one of their own ordinances, which is not binding on other nations, this does not prove that the ship was a neutral ship, and consequently the plaintiff is entitled to recover."

One reason, at least, if not the only one, is, that the goods were of British manufacture. Compare this with the reason given in *Pollard v. Bell*. It is stated, says Lord KENYON, in one of the sentences, that by their own ordinances, all ships are to be confiscated, "whenever on board there shall be found a supercargo, merchant, commissary, or *chief officer, being an enemy.*" But I say, they had no right to bind another nation by said ordinance. It appears, clearly, that the ship was condemned on other grounds; and on the ground that the captain was one of those persons, who, by their own ordinance, they wished to proscribe.

But there is a rule clearly laid down in *Price v. Bell*, 1 *East*, 681, that in the sentence of condemnation, the warranty of the assured must be clearly negatived, not in the express words of the warranty, but in terms that do not leave

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the mind in doubt as to the real cause of condemnation ; 1818.  
 express words or necessary implication. The warranty must *Philadelphia.*  
 be falsified by the sentence *itself*, or by terms from which  
 it may be fairly inferred. *Balton v. Gladstone*, 5 *East*, 160.  
 And so is the law laid down in *Church v. Hubbard*, 2  
*Cranch*, 232. To fall within the exception, it should appear  
 in the sentence, that the goods were condemned by the go-  
 vernment, on account of illicit or prohibited trade.

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The legislature of the Union has declared the *Berlin* and  
*Milan* decrees, to be direct and flagrant violations of national  
 law. The Supreme Court of the *United States*, have so de-  
 clared them. *Williams and others v. Armroyd*, 7 *Cranch*,  
 432.

If they are so to be considered, and if the *Berlin* and  
*Aranjuez* decrees, are among the causes for condemning  
 these goods ; it is settled, nothing can be more established  
 than this ; that if the ground of the decision be a foreign or-  
 dinance, manifestly unjust, and contrary to the law of nations,  
 and the insured has only infringed such partial law, this  
 shall not be deemed a breach of his warranty, so as to dis-  
 charge the indemnity. *Park*. 363. *Pollard v. Bell*, 8 *T. R.*  
 434. *Bird v. Appleton*, *Id.* 563.

These goods were expressly condemned for being of Bri-  
 tish manufacture, and the condemnation is in the very  
 words of the *Berlin* decree. The other decrees and royal  
 orders, are stated in the sentence. The royal order of  
 25th *August*, 1806 ; the decree for opening the ports, as  
 well as the royal order of 19th *February*, and the imperial  
 decree. The royal order of 25th *August*, 1806, related only  
 to the distribution of prizes among the captors. What were  
 the precise terms of the decree for opening the ports to the  
 allied powers, we are not informed. When I stated the ad-  
 mission of one of the counsel on the part of the defendants,  
 that the sentence was not founded on any royal order or de-  
 cree of 25th *June*, 1806, that admission did not exclude the act  
 of the captain general of the *Caraccas*, for it was contended  
 that the act of the captain general, and the decree for opening  
 the ports were the same, and that this act of the captain ge-  
 neral was stated by the auditor general, as one of the causes of  
 condemnation, thus anticipating the sentence of the council,  
 and the opinion, justification, and recommendation of the  
 auditor general, and thus endeavouring to constitute the whole  
 but as one sentence.

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In whatever point of view this document is to be considered, whether as authoritative and judicial, a justificatory memorial or decision, or as a recommendation to suspend the execution of a decision already made, until the royal will should be made known through the high admiralty; if any thing certain can be collected from this collection of matters and things; this mass of discordant materials, by which the auditor general attempts to justify the proceedings of the council of *Porto Cabello*, edicts, decrees, royal orders, and acts of the captain general, smuggling enemies' goods, British manufactures, justification, applause, and invective, delivered in one blaze of rage and vengeance. If he has not enveloped, in still greater obscurity, the sentence itself, it certainly has afforded strong evidence that among the causes producing the condemnation of this property, the *Berlin* decree and *Aranjuez* adoption, were not the least prominent. Nay, leaving it in doubt whether, among these causes, the suspicion of enemies' property was not mingled. "This tribunal," observes the auditor, "sits in provinces which are censuring the conduct of privateers as violations of the law of neutrality, notwithstanding they are acquainted with the positive *data* which I have stated, and represent this as a prejudice to commerce, to the treasury, and to agriculture, though they must be well convinced of the contrary by the terms of the royal order of the 19th *February*, and the imperial decree." Again, "It appears, from the proceedings in this case, that there has been published in *North America*, in the usual form, by the public papers, the imperial decree and royal order of 19th *February*, which fact argues against all the captured, and convicts them of smuggling." It will be difficult, on this statement, to maintain that these decrees and royal orders formed no part of the causes of condemnation, when the auditor states that these alone, without other causes, argue against all the captured, and convict them of smuggling. It is not the act of the captain general, but this decree and this order, which convict them. The proceedings in the cause, says the auditor, shew the imperial decree and the royal order, and their publication in *North America*.

But this is not all, for he recommends to the council "that the decree should serve for a rule for all prizes of this nature, brought by privateers into this or other ports within their jurisdiction," and for that purpose, "let a certified

copy of the proceedings be sent to all the inferior tribunals, to prevent injuries to the parties 'who have recourse to them, and a certified copy of the royal order." What royal order? Not the act of the captain general; for the act of a captain general, by no liberality of construction, can be converted into a royal order. The royal order was to be the basis of the proceedings of the inferior tribunals, and the decree in that case was to serve as a rule for all prizes of the same nature. The royal order could not be the decree for opening the ports to the allied powers. Were the proceedings of these inferior tribunals to be governed by the act of the captain general? No. The rule for their government was to be a royal order, and, as I understand from the whole document, the royal order of 19th *February*, which was to put down all criticism, as to the conduct of the privateers; that royal order which had been published in *North America*, and convicted the captured of smuggling. But this document, which was to explain the sentence, gives rise to new conjectures, and involves the causes of condemnation in other ambiguities; for it states, as its justification, "that it appears the enemy does not respect the neutral flag, but captures all vessels leaving our ports, laden with goods, the manufacture of our country, and by a reciprocity founded on the said ordinance, we ought to declare, as good prize, the vessels of friendly powers, having on board enemies' goods." And, further, "the private cruisers, which, in pursuance of this order, which authorises them to examine neutral vessels, and detain and carry them into port, in case of having well founded suspicion, have intercepted on the coast, and within sight of the ports of this province, the two vessels in question, under strong suspicion that almost the whole of the cargo belongs to our enemies."

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Did that royal order form any ground for this condemnation? But the auditor, on the score of enemies' goods, further proceeds: "It is not known to whom the goods belong, except so far as is shewn by those who carry them, and it is very probable that, when they come, sealed with the arms of an enemy, they are part, if not the whole, enemies."

That these goods were captured by Spanish privateers, is certain; it is certain that they were, at least provisionally, condemned; but that they were condemned on the ground of illicit or prohibited trade, unless that unlawfulness or prohi-

1818. *Philadelphia*, does not appear in this sentence, nor in its justification by the auditor. For all these reasons I am prepared to say that the warranty of the assured is not negated by the sentence of condemnation; and that the decrees on which sentence of condemnation has passed, are gross violations of neutral law, and not binding on other nations; and the captures, under pretence of such decrees, are within the risk. That such decrees are void, *ab initio*, and that, when this seizure and condemnation were made, they were made as prize of war; justified on the ground that the laws of war, and the rights of reprisal, authorised the seizure and condemnation; that they were captured as prize of war, condemned as prize of war, and the booty distributed among the privateers' men, as boot taken in war.

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The objection, on the ground of concealment, or misrepresentation, if there was colour for it, which I cannot discern, on the most minute examination of the whole evidence, comes too late. If it was now to prevail, there would be no end to the application for new trials.

New trial refused.

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STEWART and another administrators of NELSON *against*  
KEEMLE.

Monday,  
March 30.

IN ERROR.

If in an action of trover under the act of 22d March, 1814, an alderman or justice of the peace render judgment for the defendant, the plaintiff, if his demand of damages for the injury sustained exceed five dollars and thirty-three cents, has the right of appeal.

WRIT of error to the Court of Common Pleas of *Philadelphia* county.

The plaintiffs brought an action of trover against the defendants for three and a half tons of hay, valued at seventy-five dollars, before Alderman *Pettit*, who rendered judgment for the defendant. The plaintiff appealed. On motion of the counsel for the defendant, a rule was granted by the Court of Common Pleas, to shew cause why the appeal should not be struck off, and after argument the rule was made absolute, and the appeal dismissed. The plaintiff took a writ of error, the object of which was to have the appeal reinstated.

*S. Chew and A. S. Cox*, for the plaintiffs in error.

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*Keemle*, for the defendant in error.

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The opinion of the Court was delivered by

DUNCAN J. The plaintiffs in this case brought an action in the nature of trover and conversion before Alderman *Pettit* for a certain quantity of hay valued by them at seventy-five dollars. The alderman rendered judgment against the plaintiff who appealed therefrom in due time, and the Court below struck off the appeal, as is admitted, on the ground, that no appeal lay on such judgment by the act of 22d March, 1814. To reverse this judgment and have the appeal reinstated, is the object of this writ of error.

There is some obscurity in the terms of this act, but when taken in connexion with the several acts giving jurisdiction to justices of the peace, it does appear to me to be the evident intention of the legislature to give a plaintiff whose demand of damages for the injury sustained, exceeds five dollars and thirty-three cents, and against whom judgment is rendered, the right of appeal. To this Court belongs the interpretation of all acts of assembly, and though they cannot make laws, yet it is their duty to give them a fair construction according to their spirit and meaning. The right to a trial by a jury is a highly favoured right, and the Court will examine with eagles' eyes every act which infringes it, and certainly will not take away this privilege, unless it be done in clear and explicit terms, leaving no room to doubt, that such was the intention of the legislature. There is no rule in the construction of statutes, of the inflexible nature contended for by the counsel for the defendant in error; that without relation to the other parts of the act, or the whole system of laws; without relation to the unjust and absurd consequences, that would flow from a literal adherence; without relation to the clear scope and design of the act, Courts must adhere to the very words and letter of the law; for the letter of a statute will be enlarged or diminished according to legal discretion, so as to embrace all the purposes designed by it. Even in the construction of penal statutes, the expression has been departed from in order to comply with the manifest spirit and interest of the law. *The Commonwealth v. Messinger*, 1 Binn. 277. Even tenderness to

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1818. criminals does not require such a construction of words, perhaps not absolutely clear, as would tend to destroy and evade the very end and intention of the statute. *Rex v. Royce*, 4 Burr. 2082, but penal sanctions are not to be extended by any equity beyond the letter.

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The words of the act on which the defendant in error relies, are contained in the 2d and 3d sections. In the 2d section it is provided, that if both parties or their agents, shall not prefer a reference, the justice or alderman shall proceed to hear and determine, and if the sum adjudged does not exceed five dollars and thirty-three cents, the same shall be final and conclusive; and in the 3d section, that either party shall have the right of appealing to the Court of Common Pleas, where the judgment given by the justice or alderman alone shall exceed five dollars and thirty-three cents, and where the judgment given on the award of referees shall exceed twenty dollars.

The argument, as I comprehend it, is, that if the justice or alderman gives a judgment against the plaintiff *in toto*, who alleges the value of the property claimed in damages sustained by him to amount to one hundred dollars, he can have no appeal; but if the justice or alderman gives a judgment in his favour for ninety-nine dollars and ninety-nine cents, his appeal is permitted. That is, he may have redress by appeal, where by the judgment he admits he is injured only to the amount of one cent, yet if he complains of an injury to the extent of one hundred dollars, he is remediless. Respect for the legislature forbids me to entertain an opinion, that such was their real intention, and a careful examination of these sections satisfies my mind, that the expressions they have used, even if we adhere to the very words, do not necessarily carry this meaning. What is the case more or less than this? The plaintiff brings a suit for goods of the value of seventy-five dollars. The judgment is given by the justice or alderman against him. The justice or alderman then gives a judgment exceeding five dollars and thirty-three cents. He gives a judgment against him for the amount which he claims. I will put a case in further illustration of this. Suppose the legislature to pass an act declaring, that no writ of error should lie to the Common Pleas unless where the judgment of the Court exceeded five hundred dollars. A plaintiff brings his action in the Common

Pleas; states his demand at ten thousand dollars, on a contract. To his declaration the defendant demurs, and the Court give a judgment on the demurrer against him. Surely, that would be a judgment exceeding five hundred dollars, and I presume it could not be gravely contended, that a writ of error would not lie on such a judgment. The legislature intended, that the decisions of these expeditious tribunals should be final and conclusive where they do not adjudge a matter exceeding forty shillings, but grant an appeal where the thing adjudged exceeds that amount, to the complainant, either plaintiff or defendant.

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The 4th section directs, that appeals and every preliminary measure to carry the act into effect, not specially provided for by this act, shall be regulated by the act for the recovery of debts and demands not exceeding one hundred dollars. The mode of appeal, the recognisance to be given by the appellant, must be according to the provisions of that act. The nature of that recognisance by the plaintiff appellant is, that in case the judgment against him is affirmed, or in case he recovers a less sum, then he is to pay the costs of appeal. Now this satisfactorily proves, that a plaintiff against whom a judgment is rendered, may appeal, and he may appeal if he goes for more than the Justice has rendered judgment in his favour for, and the recognisance under the acts of 1814 and 1810 must be in the same form, and the law provides for both cases.

The words of the act are not, where the judgment given for the plaintiff shall exceed five dollars and thirty-three cents; but whatever judgment may be given, which judgment whether given for plaintiff or defendant, shall exceed five dollars and thirty-three cents, either party may appeal. It is judgment rendered, not judgment to recover.

In common understanding and in legal signification, this judgment against the plaintiff to the amount of his whole claim, the sum here adjudged, did exceed five dollars and thirty-three cents; I am, therefore, of opinion, that the judgment be reversed, and the appeal reinstated.

Judgment reversed.

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Philadelphia.\* *JONES executrix of HOZEY against STRATTON.**Monday,*  
*March 30.*

It seems that account render is not within the purview of the arbitration law. If it be, the arbitrators must not only perform the office of a jury, in case they deem the defendant liable to account, but also of auditors, in settling the account. Therefore, an award merely that the defendant do account, is bad.

**RULE** to shew cause why the judgment entered on an award of arbitrators should not be opened, and the rule of arbitration stricken off.

The action was account render, in which the defendant, a resident in *New Jersey*, was held to bail in 3,000 dollars. The plaintiff, before the entry of special bail, and before the return day of the writ, viz. on 9th *May*, 1817, entered a rule of reference, a copy of which was served on the defendant, in *Gloucester* county, *New Jersey*. On the 24th *May*, the defendant not appearing, arbitrators were appointed *ex parte*, and a copy of the certificate of appointment was left at the house of the defendant, in *New Jersey*. The arbitrators met on the 10th *June*, and on the following day filed their award, that "the defendant do account to the plaintiff."

At the following *July* Term, the Court, on the application of the plaintiff, appointed auditors.

To these proceedings the following exceptions were taken and argued, by *Mahaney* and *Murray*, for the defendant.

*Kittera*, contra.

1. A rule of arbitration cannot be served out of the county in which the action is brought.
2. There should have been twenty days notice of the meeting of the arbitrators.
3. The action of account render, is not within the provisions of the arbitration law.

The Court deemed it necessary to decide the last point only, and in delivering their opinion, GIBSON J. has gone so fully into the subject, as to render a statement of the arguments of counsel superfluous.

GIBSON J. This is an action of account render, referred to arbitrators, under the provisions of the arbitration act, of the 20th *March*, 1810, in which the arbitrators have awarded,

that the defendant do account with the plaintiff. Several exceptions have been taken to the proceedings, but the Court think it necessary to express an opinion on only one. It is very far from being clear, that the action of account render, is at all within the purview of the arbitration act. The provisions of the act are in many respects so inapplicable to this form of action, that inconvenience and difficulties would inevitably arise at every stage of the proceedings before the arbitrators. It is true, the words of the act are very large, embracing "all civil suits." Yet judging from the particular provisions of the law, I have not the least doubt, the legislature had in view, those actions only, in which the judgment is for a specific thing or sum of money; for the award, from the time of entry, is to have the effect of a judgment, and to be a *lien on real estate*, until it be reversed on appeal; and if no appeal be taken within twenty days, it is made the duty of the *prothonotary*, on the application of the successful party, to issue an *execution*, or such other *process*, as may be necessary to carry the judgment, as it is called, into effect. It would be impossible for the prothonotary to carry a judgment of *quod computet* into effect, by an execution or any other process; that can only be done by the appointment of auditors by the Court. The action is not brought for money or any specific thing, but merely to compel the defendant to settle the account between him and the plaintiff; and when the plaintiff has obtained judgment, it does not follow, that he will gain any thing by it; he may in fact be a loser, being liable to be found in surplusage to the defendant, which would furnish the latter with a good ground of action against him. The act looks to causes, that on appeal, are to be finally decided *in Court*; for it is provided, the appellant shall not be permitted to produce as evidence in Court, any books, papers, or documents, which he withheld from the arbitrators. Beside, the power of the arbitrators over the parties is strictly defined, and limited to calling for the production of books, documents, and papers, without their being clothed with the power of compelling the defendant to appear before them, and account with the plaintiff, as may be done by auditors, under the statute of 13 *Edw. 1. c. 11*, or of examining the parties on oath, in certain cases, as may be done under the 4 *Anne, c. 16. s. 27*. In fine, the provisions of the act, are in these and many other

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1818. respects, either totally inapplicable to this form of action, or so defective as to extent, as not to enable the arbitrators to do complete justice between the parties. But whether this sort of action be within the arbitration act or not, it is certain, the legislature intended the award should be final, and include every ground of controversy that might exist in the cause. The submission under the rule, is for the trial of *all* matters in variance between the parties in the cause; and the arbitrators are sworn to try *all* matters submitted to them. The bail given on appeal, is conditioned for recovering in the event of the suit, a sum greater, or a judgment more favourable than the report of the arbitrators. Unless, therefore, the award be such, that if unappealed from, it would make an end of the cause, it would be impossible to compare it with the final judgment on appeal, for the purpose of ascertaining which, was most favourable to the party. The judgment *quod computet*, is merely interlocutory. It cannot be revived by *scire facias*; neither can a writ of error be brought on it. If the action of account were within the arbitration act at all, the arbitrators would have to perform, not only the office of a jury, in case they deemed the defendant liable to account, but also that of auditors, in settling the account; at least, as far as the limited powers conferred by the act might enable them. It follows, that the rule for opening the judgment and setting aside the award, must be made absolute.

Rule made absolute.

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### WURTS and another against M'FADDON.

Monday,  
March 30.

Under the existing acts of assembly in all cases where this Court has jurisdiction,

**ACTION** on a policy of insurance on goods by the schooner *Hound*, at and from *Aux Cayes* to *Philadelphia*, underwritten by the defendant for 800 dollars. The declaration is, that the goods were lost, and the plaintiff is entitled to costs, although he recover less than 50 pounds, provided the matter in controversy be 500 dollars, or upwards.

If a declaration on a policy of insurance contain a count for a total loss, and a count for money had and received, &c. for a return of premium, and the jury find a verdict for the defendant on the first count, and on the count for money had and received, &c. a verdict for the plaintiff, for a sum less than 500 dollars, the plaintiff is entitled to costs; all disputes arising out of the same policy, being the matter in controversy between the parties.

tion contained a count for a total loss, and another for money had and received, &c. The jury were of opinion, that the policy was void, and found a verdict for the defendant on the first count. But the plaintiffs being entitled to a return of the premium in consequence of the policy being void, they found for the plaintiffs 67 dollars on the count for money had and received.

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*Binney and Chauncey*, for the defendant, obtained a rule to shew cause why judgment should not be entered without costs, the plaintiffs having recovered less than 50 pounds.

*J. R. Ingersoll*, for the plaintiffs, opposed the rule.

The several acts of assembly upon which the question depended, are noticed in the opinion of the Court, which was delivered by

**TILGHMAN C. J.** By the act of 25th *September*, 1786, this Court was invested with original jurisdiction in the city and county of *Philadelphia*, in all manner of suits, causes, and actions; but if any plaintiff who commenced his suit here did not recover more than 50 pounds, he was not allowed any costs. Thus the matter stood until the 24th *February*, 1806, when an act was passed, by the 19th section of which, all original jurisdiction in civil actions was taken away; and by the 29th section all former acts, so far as they were inconsistent with that act, and no further, were repealed. I take it, that by virtue of this act of 24th *February*, 1806, that part of the act of 25th *September*, 1786, which related to costs in suits commenced in this Court, was repealed; for where no suits could be commenced, there could be no costs. After this came the act of 20th *March*, 1810, by which the original jurisdiction of this Court, in the city and county of *Philadelphia*, was restored in all civil actions, wherein the matter in controversy is of the value of 500 dollars or upwards; but there is no restriction as to costs. It follows, therefore, that in all cases where the Court has jurisdiction, costs are of course.

The act of *September*, 1786, discouraged the bringing of suits for small matters, by refusing costs where not more than 50 pounds was recovered. The act of *March*, 1810, did the same thing in a different, but more effectual way; that is to

1818. *say, by denying any jurisdiction in cases where the value of the matter in controversy was not at least 500 dollars. I think it clear, therefore, that the plaintiffs are entitled to costs, in case, although they recovered less than 50 pounds.*

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But in the course of the argument, another point was raised which goes to the jurisdiction of the Court as to the count for money had and received; because the amount of the premium, which was in controversy on that count, was less than 500 dollars, without laying down any general rule for the government of all cases. Wherein different causes of action are joined in the same suit, I shall consider only the case before the Court. Although a demand for a total loss is different from a demand for a return of premium, yet they both arise from the same transaction. It is often extremely difficult for the assured to know, whether he shall be able to make good his claim for a loss, and it is very convenient to both parties, that all matters in controversy, touching the same insurance, should be tried in one action. The insurer has no reason to complain; because if he thinks the policy void, he may bring the premium into Court, and then as to costs the plaintiff must proceed at his peril. It appears to me, that all disputes arising out of the same policy of insurance, may be fairly considered as the matter in controversy between the parties; although they may afford ground for several actions. When therefore the plaintiff thinks proper to join them in one action, he should be encouraged in so doing, because it prevents multiplicity of suits. I am of opinion, that in the present case, the matters contained in the several counts, are within the meaning of the act of assembly, *the matter in controversy in this suit*, and as they amount to more than 500 dollars, they are within the jurisdiction of the Court. Judgment should, therefore, be entered for the plaintiffs, with costs.

Rule discharged, and judgment for the plaintiffs, with costs.

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Philadelphia.**GIRARD *against* HUTCHINSON.****Same *against* same.***Monday,*  
March 30.

THE arbitrators to whom both these causes were submitted, under the act of 20th *March*, 1810, met forty-two times, and charged for forty-two days, spent in the investigation of each case. But the Court decided that they were only entitled to be paid for forty-two day's service in the whole, *viz.* twenty-one in each case.

It appeared that the matter of the two causes was intermixed, and that the arbitrators might have decided either of them separately, in much less than forty-two days.

of both cases; and cannot make a distinct charge for each case.

If two causes between the same parties are investigated and decided by the same arbitrators at the same time, they are entitled to be paid only for the number of days actually spent in the investigation for each case.

**The Commonwealth *against* MARIS.****Same *against* Ross.***Monday,*  
March 30.

THESE two actions were referred, under a compulsory rule to arbitrators, who awarded as follows :

"The arbitrators, in the above two causes, having heard the respective parties, their witnesses and allegations, do find for the Commonwealth the sum of one thousand dollars."

One award having been made in two actions submitted to the same arbitrators, the Court set it aside.

A motion was now made by *Solomons*, for the defendant, to strike off the award, while *C. J. Ingersoll*, at the same time, moved to send it back to the arbitrators to be amended by entering a several award in each action, founding his application on an affidavit of one of the arbitrators that such was their intention.

The award had been filed more than twenty days before these motions were made.

THE COURT were of opinion that the award should not be sent back to the arbitrators, but that it should be set aside; being one award in two actions.

Award set aside.



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**FIELD** against **EARLE** and another, administrators *de bonis non* of **WILLIAMS**.

Friday,  
April 3.

The Court will not on a motion for an order that the sheriff perfect the title to lands sold by the late sheriff on a *venditioni exponas*, enquire whether the judgment on which the sale was founded, were unfairly obtained, but will leave that question to be tried in an ejectment by those who are interested in establishing the fraud.

**TILGHMAN** and **Binney** moved the Court for an order that the sheriff of *Philadelphia* county should perfect the title to certain lands, the property of *Daniel Williams*, deceased, under a sale, made by the late sheriff, to one *Clark*, by virtue of a *venditioni exponas* issued in this suit.

The motion was opposed by *J. R. Ingersoll*, *Chauncey* and *Wallace*, on the ground that the real purchaser at the sheriff's sale was the plaintiff, and that the original judgment was unfairly obtained. After they had opened the facts on which they resisted the motion,

THE COURT granted the motion for the order, that the present sheriff perfect the title; because, if there was any fraud in obtaining the original judgment, the creditors of *Daniel Williams*, or his heirs, might have it tried in an ejectment; whereas, if the Court should not permit the sheriff's title to be completed, it would debar *Field* of the benefit of a trial by jury.

**Motion granted.**

## The Commonwealth against CORNMAN.

1818.

*Philadelphia.**Saturday,  
April 4.*

A *HABEAS CORPUS*, returnable before the Chief Justice, sitting at *Nisi Prius*, on the 18th February, 1818, issued to the keeper of the debtors' apartment, for the city and county of *Philadelphia*, to produce the body of *Oliver Caulk*, together with the cause of his detention. He returned, that *Caulk* was detained, by virtue of a precept from the brigade inspector, of the first brigade of the first division of the militia of *Pennsylvania*, which was annexed to the return. It was directed to a constable, and commanded him to levy upon the goods and chattels of the said *Caulk*, a fine of two dollars, imposed on him as an enrolled militia man, for non-attendance at the parade for discipline, on the 27th October, 1817, which fine was not remitted by the court of appeal, to which he belonged; and for want of sufficient goods and chattels, to take his body, and convey him to the debtors' apartment, of the city and county of *Philadelphia*, "*there to be kept by the sheriff or keeper of the prison, until the said fine and costs are paid.*"

After a partial hearing, the case was adjourned to the next sitting of the Court in Bank, where it was very elaborately argued, on the 1st April, 1818, by *Hallowell* and *Binney*, for *Oliver Caulk*, and by *J. Randall* and *C. J. Ingersoll*, for the brigade inspector.

The Judges, in delivering their opinions, having noticed

are entitled to be heard before that court. If a person who is entitled to be placed on the list of exempts, be returned as an enrolled militia man, with a fine imposed on him for non-attendance at parade, and he do not appear before the court of appeal, to claim his privilege, in consequence of which, he is returned by the president of the court to the brigade inspector, in the list of persons whose fines have not been remitted, his case is to be considered as having been before the court, and a judgment pronounced upon it; and it being a matter within their jurisdiction, their sentence is conclusive.

A warrant, directed by the brigade inspector to a constable, commanding him to levy the fine for non-attendance at parade, on the goods and chattels of the delinquent, and for want of such goods and chattels, to take his body, and convey him to prison, *there to be kept until the fine and costs are paid*, is bad; the 23d section of the act of 23th March, 1814, only authorising, in such cases, an imprisonment *not less than one, nor more than two months*, at the discretion of the field officers of the regiment, to which the delinquent belongs.

It seems, that if the field officers of the regiment, before any warrants issued, were to determine the period of imprisonment, in the case of each delinquent; a warrant, commanding a constable, to levy on property if to be found, but, if not, to imprison the delinquent, for the time directed by the field officers, with a recital, that the said officers had, in pursuance of the act of assembly, directed the imprisonment to be for such a time, would be good.

1818. the leading features of the argument, which turned on the construction of the several acts of assembly, for the organisation and government of the militia, particularly that of 19th *March*, 1816, on which the warrant in question was founded, the reporters are unwilling to increase the magnitude of this report, by giving even a short sketch of the observations of the counsel.

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TILGHMAN C. J. It appears by the return to this *habeas corpus*, that *Oliver Caulk*, is imprisoned by virtue of a warrant from *Daniel Sharp*, inspector of the 1st brigade of the 1st division of *Pennsylvania* militia, for a fine of two dollars, imposed on him as an enrolled militia man, for non-attendance at the parade for discipline, on the 27th *October*, 1817, which fine was not remitted by the court of appeal. The warrant is directed to a constable, and commands him to levy the fine, of the goods and chattels of the said *Caulk*, and for want of sufficient goods and chattels, to take his body and convey him to the debtors' apartment of the city and county of *Philadelphia*; *there to be kept by the sheriff or keeper of the prison, until the said fine and costs are paid.*

It was given in evidence, that *Oliver Caulk* was enrolled as a militia man, in captain *Abraham Wandell's* company. The muster roll was produced, verified by the oath of captain *Wandell*. It was also in evidence, that the name of the said *Caulk*, was not in the list of exempts. And I understand, that he is of the society of *Friends*, and conscientiously scrupulous of bearing arms. There was no evidence of his having ever consented to be enrolled as a militia man, other than the muster roll; and there is great reason to suppose, that he never did give such consent. He never appeared before the court of appeal, and he was included in the list transmitted by the president of the said court, to the brigade inspector, of persons who had been fined, and whose fines were not remitted.

On the part of the said *Caulk*, two points have been made.

1. That this Court cannot consider him as an enrolled militia man, subject to a fine for non-attendance at parade.
2. That if he were, the warrant issued by the brigade inspector, was illegal and void.

1. In order to prove that he was not enrolled according to law, reference is had to the act of 21st *March*, 1816, under

which the enrollment was made. By the 2d section of this act, it is enacted, that within 15 days from the 1st day of *October*, in each year, the captain of each company, "shall enrol each person residing within the limits of his company, liable to perform militia duty, and shall enter the name, age, and place of residence of every such person, in his roll-book; and also take, or cause to be taken, another list of such persons, *as shall decline to be enrolled as aforesaid*, who shall be considered as exempt, or persons exempted from training with the militia; and every person *refusing to make a choice as aforesaid*, shall be considered as an exempt, and shall be so entered in the enrolment." The counsel for the Commonwealth contend, that in order to obtain the privilege of an exempt, some positive, affirmative act is necessary. If the matter rested on the first part of the sentence, I should think so too, for, *declining* to be enrolled, must be understood, as *expressing a desire* not to be enrolled. But how are we to construe, the subsequent words, *every person refusing to make a choice as aforesaid, shall be considered as an exempt*. I can perceive but one meaning, which is, that every person who did not expressly say, whether he desired to be enrolled or not, should be considered as an exempt. We must not reject these words, or suppose that they were inserted without meaning. At first thought, it may appear extraordinary, that a man should have the privilege of an exempt, without expressing his desire of exemption. But upon reflection, it will appear, that this part of the law has been drawn with great consideration, and great tenderness towards those religious societies, who are conscientiously scrupulous of bearing arms. For it is well enough known, that some of those persons will say nothing on the subject. They would think it wrong to go to the captain's quarters, and express their desire to be placed on the list of exempts. The words which create the difficulty, have been thrown into the law, by some one who was acquainted with the extreme degree to which scruples are sometimes carried, and with a view of securing an exemption from militia duty, to persons of the most tender conscience. Nor is the Commonwealth injured by this indulgence; for in time of peace, the money of those who do not wish to be trained, is more valuable than their service. That this was the sense of the legislature, there can be no doubt; because the privilege of an exempt,

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1818. is not confined to persons of tender conscience ; every man who chooses, may enjoy it. Light may be thrown on this law, by recurring to another, made on the same subject, but repealed. By the act of 9th April, 1807, § 2, the officer making the enrolment, was directed, particularly to designate all persons *who should desire to be considered as exempts, &c.*; but if any person *should neglect or refuse, to make his choice as aforesaid* the officer, was to place his name on the list of exempts. Now, although those two acts, are somewhat different in their expressions, yet, in substance they are the same ; that is to say, they both consider those persons as exempts, *who make no choice to be enrolled or not.* The law of 1807, has indeed the word *neglect*, which is omitted in the law of 1816, but that is immaterial, because *neglect* amounts to *refusal*, within the obvious meaning of the act of 1816. It was the duty, therefore, of captain *Wandell*, to place *Oliver Caulk* on the list of exempts, unless he made choice to be enrolled. But the question is, in what character does *Caulk* appear to this Court ? His captain has returned him, on oath, as an enrolled militia man, his name was transmitted to the court of appeal, as such, with a memorandum of his being fined two dollars, for absence from the parade ; he made no defence before that court, consequently his fine was not remitted, and his name was in the list sent by the president of the court to the brigade inspector, of persons who had incurred fines which had not been remitted. Although the court of appeal, be a court of limited and inferior jurisdiction, yet, their proceedings on matters submitted to them according to law, must not be questioned by this Court, on a *habeas corpus*. We must consider, therefore, whether the matter of *Oliver Caulk's* fine, was brought legally before the court of appeal, and what were the proceedings on it. The act of assembly directs, that the muster roll, or a copy, shall be sent to the court of appeal, with a list of those persons who have been fined, *and also a list of the exempts.* The power of the court is confined to the remission of fines. In the present instance, every thing which the law requires was done ; the muster roll, the list of persons fined, the list of exempts, were all sent. But it is objected, that the causes for which the court may remit fines, are specified in the act of 1814, sect. 24, *viz.* lameness, sickness, or other unavoidable cause ; and, therefore, they could not remit the fine of

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an exempt. But it must be observed, that although the act of 1814, being made during war, takes no notice of exempts, because in war no exemption was permitted; yet the supplement to that act, made in 1816, after the return of peace, restores the privilege of exemption, and expressly gives to the exempts, *the same right of appeal, either by themselves, or others on their behalf, as is by law provided for absentees.* This provision extends the jurisdiction of the court of appeal to the cases of exempts; so that whether *Oliver Caulk* was an enrolled militia man, or an exempt, he might have been heard before that court. But it is said, that he did not appeal, and, therefore, the court did not act upon his case, and cannot be said to have *pronounced any judgment.* I apprehend, that within the meaning of the act of assembly, there was a proceeding in the case of every person who did not appeal. Every person had notice of the day of appeal, and those who did not appeal, virtually acquiesced in the fine which had been imposed on them. When this fine was not remitted, it was substantially confirmed, in the only way in which the law permits the court of appeal to act. In this respect they have but a negative office. They can do no positive act, but remit the fine. If they do not remit, they are not to give a judgment of affirmance, but in consequence of non-remission, the fine stands of course. The president of the court delivers to the brigade inspector a list of the persons *whose fines were not remitted*, and upon this he acts. It appears to me, therefore, that *Oliver Caulk's* case was before the court of appeals, although he himself did not appear there, and that there was a *proceeding in his case.* Suppose he had been returned as an exempt, would it not have been the duty of that court to remit his fine as an absentee? Undoubtedly it would. So if *Oliver Caulk* had attended the court of appeals, and satisfied them, that his name ought to have been on the list of exempts, but was placed on the muster roll, through a mistake of the captain, either in fact or law, it would have been the duty of the court to remit the fine. It is much to be wished, that the members of those respectable religious societies, whose consciences do not permit them to bear arms, would make themselves masters of the militia law, and pay attention to their own rights. I venture to say, that the law in question has not been forgetful of them; but if they think it improper to take any steps on their own behalf,

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1818. they will unavoidably suffer; for when their cases are brought before the Courts, the Judges are bound by oath and conscience, to interpret the law according to its true meaning, without regard to consequences. On full consideration, I am of opinion, that *Oliver Caulk* being returned as an-enrolled militia man, and his fine not having been remitted, this Court can make no further inquiry into the subject.

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I am next to consider, whether, supposing him to be subject to the fine, the brigade inspector has issued such a warrant as is conformable to law. By the 20th section of the act of 28th *March*, 1814, the brigade inspector is to issue his warrant in each of the cases reported to him, directed to a constable, within the bounds of the county in which the delinquent resides, commanding him to *levy and collect the penalty incurred in each case*. The words *levy and collect*, are applicable to a seizure of property, and not to an arrest of the person; so that there would be no pretence for an imprisonment of the body, were it not for the subsequent expressions in the same paragraph, by which it is provided, that the constable shall proceed to collect the said fine, with costs, "in the same manner, and with the like power and effect, as constables are required to proceed with, in executions by virtue of an act, entitled, "an act to consolidate and amend, with its supplements, the act, entitled, "an act for the recovery of debts and demands, not exceeding 100 dollars, before a justice of the peace, and for the election of constables, and for other purposes, passed the 20th day of *March*, 1810." Upon referring to this act, we perceive, that in case no property is to be found, the defendant is to be committed to jail, there to remain, until the debt and costs are paid. Had this case rested, therefore, on this section of the act of *March*, 1814, the construction must have been, that the delinquent is liable to imprisonment until the fine and costs are paid. But after inflicting fines in a number of cases specified in the 21st and 22d sections, the act proceeds to the 23d section, entitled, *Collection of fines*; the first paragraph of which declares, that all fines and forfeitures incurred under the said act, for the recovery and appropriation of which no mode is pointed out, shall be recovered by the brigade inspector, *as debts of the like amount shall be by law recoverable*, (that is, either before a justice, or in a court of record, as the amount shall exceed 100 dollars, or not.) The second paragraph

directs, that when any alderman or justice, shall have received from the brigade inspector, a certificate of any fines incurred, he shall proceed to recover and collect the same, in the same manner as debts of the like amount, may be by law recoverable. Thus we see, that a mode of recovery was pointed out in all possible cases, and each mode admitted of imprisonment of the delinquent, in case he had not property sufficient to satisfy the fine and costs. Then comes the third paragraph of the same section, which enacts, in general terms, that "in case any delinquent or delinquents shall neglect, or refuse, to pay the fine or penalty incurred by him or them, and in case no property shall be found, belonging to any such delinquent or delinquents to satisfy or discharge the same, the body or bodies of any such delinquent or delinquents shall be committed *each upon a separate warrant*, to the common jail of the proper county, there to be supported at the expense of the proper county, *not less than one nor more than three months*, at the discretion of the field officers of the regiment within the bounds of which such delinquent or delinquents shall have resided, or until the delinquent or delinquents shall have paid the penalty or penalties incurred, or shall be discharged by due course of law." The object of this paragraph plainly is, to restrict the power of indefinite imprisonment, which would otherwise have arisen, from the preceding part of the law. It is general in its expressions, and appears to be as general in its intent, except in one or two instances, where the time of imprisonment had been limited; (for example, persons having public property in their possession, and refusing to give it up, are liable to a fine of treble the value, and for want of effects to pay the fine, they may be committed to jail for a term *not exceeding one month*.) I have sought in vain, for a reason, which should induce the legislature to subject a militia man, whose poverty did not afford goods to the amount of two dollars, to an unlimited term of imprisonment; when at the same time they extended their clemency to others, who had incurred greater penalties, and therefore must be supposed to have been more culpable. What right then, has the Court to restrict that general clemency which the words of the act import, and by what rule shall we distinguish the cases to be excepted? I have thought much on the subject, and can find no satisfactory principles on which the generality of the expressions can be

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1818. restrained. Nay, I am strongly inclined to believe, that the *Philadelphia* very case of militia men fined for absence, was directly in the mind of the legislature, from their having ordered, that a *separate warrant* should issue in each case. This is particularly applicable to absentees, whose names appear in one roll, and against whom a joint warrant used formerly to issue. I am satisfied, therefore, that the safest construction of the law is to protect the absentees from imprisonment longer than three months. Consequently the warrant in the present case, is unlawful, because *Oliver Caulk* is committed indefinitely until the fine and costs are paid. It is objected, that there will be great difficulty in framing a warrant under this construction of the act, because it is uncertain what length of imprisonment the field officers of the regiment may direct. Although it is not strictly the duty of this Court to give advice as to the form of warrant, yet I will suggest a mode of proceeding which will remove all difficulty. Let the field officers be called together, before any warrants issue, and determine the period of imprisonment in the case of each delinquent. The warrant may then order the constable to levy on property, if to be found, but if not, to imprison the delinquent for the time directed by the field officers, with a recital, that the said officers had, in pursuance of the act of assembly, directed the imprisonment to be for such time.

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Upon the whole, I am of opinion, that *Oliver Caulk* is liable to the fine of two dollars, but that the brigade inspector has issued a warrant contrary to the act of assembly. The warrant being illegal, the prisoner should be discharged.

GIBSON J. There cannot, I think, be a doubt, but that the relator is to be considered as an exempt, under the second section of the act of 1816. The captain is to enrol each person subject to militia duty within the bounds of his company, and also take a list of all persons who shall *decline* to be enrolled. Did the matter rest here there would be no difficulty; the enrolment would include the party of course, and he could only avoid it, by doing a positive act, evincing his dissent. This would be the natural and obvious meaning of the word. But this meaning is qualified and changed by the succeeding clause, "that every person refusing to make a choice as *aforesaid*," shall be considered an exempt. This, without the word "*aforesaid*," would be a distinct and sub-

stantive provision, which I confess, in that view, would equally embrace the case of the relator; but as both clauses stand together, the latter shews what the legislature meant by "declining" to be enrolled; to wit, refusing to make a choice to be included in the enrolment. I do not mean to say, that a militia man may not positively decline; on the contrary, by doing so, he satisfies the letter of both clauses. The object of the second clause, no doubt, was to enable a large and very respectable class of our fellow citizens, conscientiously scrupulous against bearing arms, or doing any act required by laws of a military character, to slide insensibly into the class of exemptions. Had the law been otherwise, it is certain, these citizens would have been deprived of the benefit of the provision, if benefit it be; for we know they will do no act which acknowledges a military character, as appertaining to them; not even the payment of a fine; preferring rather to suffer their property to be sold. This we call prejudice; but if it be so, a conscientious prejudice has as strong a claim on our indulgence, where it comes not in conflict with the public weal and security, as an opinion founded on the plainest and most obvious principles of reason.

But that the proceedings of the court of appeal are conclusive in the present inquiry, I have as little doubt. On the subject of the conclusiveness of the sentence of a court martial or court of appeal, I expressed an opinion in the case of *Houston v. Dicks and others*, which nothing has since induced me to change. I shall only add, that I do not consider the acts of 1814 and 1816, as establishing any new principle, but as declaratory of the common law, except so far as the courts are precluded from taking appellate jurisdiction, or sustaining an exception on the ground of informality, or entertaining an action of trespass for acts done pursuant to such sentence. The remedy by *habeas corpus* is preserved as fully and entire as it existed before the act of 1814; but it does not follow, that we are at liberty to re-hear on its merits the matter decided by the court of appeal. If the court has decided on a matter within its jurisdiction, there is an end of inquiry; it has passed *in rem judicatum*. I confess my impression at one period of the argument was, that the court of appeal had not decided at all in this instance, not having a power to impose a fine, but only to remit one, and having, as

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1818. it struck me, merely an appellate jurisdiction to act on an appeal actually taken by a party coming before it for that purpose ; and that as the relator had not appeared before the court of appeal, his case had not been submitted to it. But I am satisfied this Court does necessarily pass on the case of every absentee returned to it. A list of absentees is laid before it, as the subject of its inquiry. An opportunity is afforded to each person whose name is found on it, to appear and make his defence, and this list with the fines remitted is certified to the colonel, and notice of the fines not remitted, given to the brigade inspector, preparatory to his issuing process. It is said the law imposes the fine ; be it so. But has the court of appeal no agency in giving effect and operation to the particular provision imposing it? Would not process issued without the list of cases having been first submitted to this tribunal, be illegal? If the imposition of the penalty were complete before this tribunal had acted, this consequence would not follow ; and all that a party could complain of would be that the brigade inspector had proceeded to execution without giving him an opportunity of carrying his case before another tribunal ; but the proceedings would be regular on their face. That the court should in fact take into consideration each case separately is not requisite. A party having an opportunity of being heard is contemplation of law actually heard. But then it is said, that the court of appeal is limited in the exercise of its powers to granting relief in specific cases, and for specific reasons, different from the relief to which the relator was entitled. Under the act of 1814 it was so ; for under that act, there were no exemptions ; and as to enrolments, illegal, on other grounds, as of persons above the age of forty-five years, or exempt, entirely, from the operation of the militia law, it was not necessary that court should act, such persons being without its jurisdiction. But the case of an exempt is different : he is within the scope of the militia law, and having jurisdiction over his person, he is bound by the judgments of the courts organized under it, and to prevent injustice, the right to an appeal is accordingly secured to him by the section of the act creating this class of militia-men. It is argued, however, that the appeal is given to him, and must be demanded in the character of an exempt ; and that the list being laid before the court of appeal, at its last session in the year, an exempt can-

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not have an appeal before he is known to the court in that character; and that, in the present instance, the relator not having been classed as an exempt, could not at any time have an appeal. This is a forced and unnatural construction, tending to render the right of appeal of little value. At the end of the year, when the whole fine is due, having been incurred by the very act of becoming an exempt, I am at a loss to know what the exempt could have to urge. But if a militiaman has been deprived of the right and benefit of becoming an exempt, he has something to complain of that may require the intervention of such a court; it is the very thing the relator now complains of. He must go before the court of appeal in the character of an exempt, I grant, but it does not follow that the court must acknowledge the justice of his claim to that character before it can entertain his appeal; that would be a *petitio principii*. I am not only of opinion that the court of appeal had the power of acting on the relator's case, but that it did act; and consequently that the proceeding being in the nature of a sentence is conclusive. Were it otherwise, the provisions of the twenty-fifth section of the act of 1814, and the third section of the act of 1816, would be nugatory as to this sort of Court, which is expressly included and spoken of as a Court whose sentence or decision, is to be conclusive. It evidently was the intention of the first mentioned act that these proceedings should be considered as a sentence, and the second expressly mentions its "*proceedings*," as being so. But objections are made to the form of the process under which the relator has been committed. It is said the brigade inspector is not the proper officer to enforce the collection of the fines, but that it must be sued for before a justice of the peace, as debts of the same amount. By the twenty-third section of the act of 1814, this is the case where no specific mode of proceeding is pointed out. But by the twentieth section there is a mode pointed out, and the brigade inspector is to issue his warrant to carry into execution the sentences of courts-martial, and to collect penalties not remitted by a court of appeal. This provision, I admit, is applicable, though not exclusively so, (as argued by the counsel of the relator,) to the case of a court of appeal, convened by the brigade inspector, when about to enforce a penalty under the twenty-fourth section; for, according to the argument, that court does not remit a fine, but inflicts one. The

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1818. penalties recoverable before a justice of the peace, are those imposed on offences committed against the provisions of the militia law, by persons not enrolled, and not subject to military controul. It is very proper that such persons should be tried before a civil tribunal. The trial of a person not a soldier, perhaps a woman, by a court-martial, would be a novelty, and certainly not in strict accordance with the constitutional injunction of keeping the military in strict subjection to the civil power. But there are fines for offences committed by officers and privates, under the twenty-first section of the act of 1814, for the collection of which no particular mode is pointed out; such as a captain neglecting to furnish a class list, an officer or private pledging public property, or leaving parade without the permission of the commanding officer, and a variety of others. These are recoverable by a justice of the peace, and are alluded to in that part of the twenty-first section, which provides that the justice, on receiving a return of fines by any officer or private, shall proceed to recover them as debts of like amount. And this provision is satisfied, and the law rendered consistent throughout, without giving the justice-jurisdiction over fines unremitted by a court of appeal.

But, granting the brigade inspector is the proper officer to issue the process, still it is said the warrant, in this instance, is not in proper form, and that this error, in form, is to the relator a matter of substance, the commitment being for an indefinite period, when it ought to have been for a term at most not exceeding two months. On this part of the case, I acknowledge I feel hesitation and doubt. By the twentieth section of the act of 1814, the brigade inspector is to issue his warrant to the constable, commanding him to levy and collect the penalty incurred; and the constable is to proceed with the like power, and in the same manner, as under an execution issued by virtue of the one hundred dollar act. I see no objection to the setting out specially the course to be pursued by the constable. I doubt whether the warrant would be good without it. If this were all that is to be found on the subject, this warrant would indisputably be good. But in the twenty-third section we find that if *any* delinquent shall refuse to pay his fine, and no property shall be found, belonging to him, he shall be committed for not *less than one, nor more than two months, at the discretion of the field officers of*

*the regiment.* This is a general provision, not particularly applicable to any case of commitment; and it would be difficult, and perhaps a harsh construction, to restrain the generality of the words; particularly as the relator, not, perhaps, being entitled to the benefit of the insolvent laws, might be detained indefinitely, and this commitment might, in effect, be a commitment for life. The words of the clause, last referred to, are extensive enough, to embrace every penalty incurred under the law. Why should it be so construed as to exclude the relator's case? Shall there be a period of limitation to the confinement of a culprit, convicted of a positive crime, (drunkenness on parade for instance), by the sentence of a court martial, and shall a penalty for a mere omission, arising possibly from poverty, and an absolute necessity of being absent to provide sustenance for his family, subject an absentee to indefinite imprisonment? It is evident, the legislature did not view absence from training, as the most unpardonable offence that might be committed against the act, or the smallest pecuniary penalty would not have been attached to it. If the provision does not apply to a penalty of this kind, to what does it apply? What reason is there for referring it to penalties enforced by the sentence of a court martial, or recovered by the judgment of a justice of the peace, that does not at least equally apply to that class that are recovered through the intervention of a court of appeal. The provision is found under the general head of the collection of fines; the letter extends to all cases, and I have no doubt, was intended to embrace all cases; for it must have occurred to the legislature, that in case of inability to discharge the penalty, the imprisonment without a provision of this kind, would be perpetual; and I think it highly probable, that if any case was particularly in view, it was that of an absentee from training. Of this, the injunction in the clause itself, that the commitment shall be on *separate warrants*, is satisfactory evidence. Cases of penalties for other offences, must, from their nature, be unconnected with each other, and could not without confusion and inconvenience, be included in the same warrant. But penalties for delinquencies of this sort must be numerous, incurred at the same time, and by the same kind of omission, proceeded on together, and returned together in a list to the brigade inspector for collection; hence the propriety of directing separate

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1818. warrants; and I am informed, before this act, the practice  
*Philadelphia.* was to include all in one. I am disposed to give this part  
 of the law its utmost effect; and extending it to the case of  
 the relator, it follows, that the commitment is substantially  
 bad. Every commitment must have a proper conclusion,  
 and where it is under a statute, the provisions of the statute  
 must be pursued. *Hawk.* p. 6, book 2, ch. 16, sect. 18. In  
*Hollingshead's* case, 1 *Salk.* 331, a bankrupt was committed  
 by the commissioners, for refusing to be examined, and the  
 conclusion was, until he submit, "or be otherwise discharged,  
 by due course of law," whereas, the statute directed, that he  
 should be committed, "till he submit himself to be examined  
 by the commissioners," and he was discharged on a *habeas*  
*corpus*. So in *Bracy's* case, 1 *Salk.* 348, where the bankrupt  
 was committed by the commissioners, "till he conform him-  
 self to our authority;" and in *Toxley's* case, *Carthew*, 291, *pl.* 3,  
 the commitment of a catholic priest, for refusing to answer,  
 was held bad, because the commitment was to prison, "there  
 to remain, till he shall be discharged by due course of law,"  
 when the words of the statute were special, authorising a  
 commitment until he shall answer the question. Here, the  
 commitment is in execution, "until he pay the fine and costs."  
 The act directs, that delinquents shall be committed to the  
 jail of the proper county, not less than one, nor more, than  
 two months, at the discretion of the field officers of the re-  
 giment, within the bounds of which the offender resides, or  
 until he shall have paid the penalty, or have been discharged  
 by due course of law. It is obvious, therefore, the commit-  
 ment does not follow the act, and the consequences of the  
 variance to the delinquent may be most serious. It may be  
 difficult to ascertain what is a proper form, or how the com-  
 mitment may be fashioned, so as to give the delinquent the  
 full benefit of the provision, without practical inconvenience.  
 I think the warrant would be good, if the words were follow-  
 ed, leaving the field officers to exercise their discretion or  
 not, they giving notice of their decision to the jailor, in case  
 they thought proper to remit any part of the time within  
 their controul; and if those officers did not choose thus to  
 interfere, the confinement would, at the utmost, endure but  
 for two months. To this I see no objection on the ground  
 of uncertainty, for the jailor knows exactly what he has to  
 do; he must detain his prisoner for two months, if he be not

sooner discharged by competent authority. But if uncertainty do exist, it is created by a positive statute, and the commitment would not thereby be rendered void. But the field officers might exercise their discretion before the issuing of the warrant, and thus give an opportunity to the brigade inspector, to insert the exact period of confinement to be suffered, in the event of the delinquent being committed; and I would lean to support either course. It is, however, immaterial, in the present inquiry, how, or in what form, the delinquent is to have the benefit of the provision in his favour; it is sufficient, that the form of the commitment, under which the relator is detained, excludes it. To be set at large on this ground, may be of small advantage to him, as he may the next moment be taken on a new warrant, unexceptionable in this particular. But, as he appears to me to be illegally detained, I am bound to say, I think he ought to be discharged.

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v.  
DUNCAN.

DUNCAN J. This Court is not sitting as a court of error, to revise the regularity of the proceedings on which the warrant of commitment issued. It will be enough, if we find a sentence pronounced by a court of competent jurisdiction, to inquire into the offence, and with power to inflict the penalty, and a warrant founded on that sentence, and not transcending the punishment and penalty inflicted by law; and further than this we cannot look.

There appears more importance attached to this case than it merits. The inquiry has no relation to religious persuasions or conscientious scruples, nor does it give rise to the discussion of any constitutional question. For whatever may be the construction of the act of 19th March, 1816, whether that contended for on the part of the relator, or by those supporting the commitment, the difference is unimportant; for the penalties for the year are the same; the offence the same; the tribunal the same; and the mode of execution the same. The only difference consists in this, that if enrolled, the penalty is inflicted three times in the year, if exempt, only once in the year.

If the question was now open for inquiry in this return, the inclination of my mind is, that the captain should have placed *Oliver Caulk* on the exempt list; to some the exemption would be considered as punishment, by others, enrol-

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1818. ment would ; to all whose religious persuasions and honest  
*Philadelphia.* consciences, forbid the use of arms, and submission to mili-  
 The Com- tary discipline, enrolment would be considered as punish-  
 monwealth v. ment. And I cannot but consider, that the framers of this  
 CORHAM. law, enacted in the time of peace, looked to that class of  
 citizens, numerous and respectable as they are, who were  
 members of religious societies, who conscientiously bear  
 testimony against the use of arms, *Friends, Menonists,*  
*Dunkers*, whose scruples are regarded by the constitution,  
 and whose exemption from personal military service it se-  
 cures, while it subjects them to pecuniary contribution,  
 in lieu of personal service, and to others, who had no reli-  
 gious scruples on that score, but who might choose to sub-  
 mit to a small penalty, payable only once in the year, rather  
 than be subject to military training. Keeping in view these  
 two classes of exempts, those exempt from choice, and those  
 for conscience sake, it was expected that the first would make  
 the choice at the time of enrolment, by declaring their dis-  
 inclination to be enrolled, but those who declined training  
 for conscience sake, having no choice to make, the unusual  
 phraseology of refusing to make a choice was adopted; by  
 this construction, the whole clause is consistent and intelli-  
 gible ; in no other way can we account for the consequence  
 of refusing to make a choice ; exemption from enrolment.  
 If to decline to be enrolled, signifies an act done, then to de-  
 cline to be enrolled, is a refusal to be enrolled, and the choice  
 is made ; then follows the provision to members of all reli-  
 gious societies, who have conscientious scruples—those who  
 by their public religious profession, had given testimony,  
 that they had made their choice ; they have no choice to  
 make, and, therefore, must be considered as refusing to make  
 a choice.

Conscience might be as much affected by an agreement to  
 commute, as by the commission of the act itself ; it would,  
 by many, be considered as a compromise with conscience ;  
 as the purchase of an indulgence ; as taking out a dispensa-  
 tion ; as a voluntary contribution for military purposes ; it  
 cannot justly be supposed, that the legislature, well knowing  
 that this was the course of reasoning of many tender con-  
 sciences, would offer them the choice, while they well knew  
 their consciences would not permit them to make a choice at  
 all.

But in any view of this subject, I would consider the neglect to make the choice the act of omission; would amount to an act of refusal; refusing to make a choice; if this is to be a positive affirmative act of refusal, to whom, where, and in what form is it to be made? If one has the choice of two things, and on his refusal to make such choice, a certain consequence is to follow, in a certain time; and he is called upon to make the choice, and remains silent, this would amount to a declining and refusal. It would not be necessary for him to say in so many words, I refuse to make a choice; his silence would amount to a refusal, and the prescribed consequence follows. I should have more difficulty in coming to this conclusion, if the consequence of refusal was enrolment. Voluntary silence is a refusal to speak.

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 v.  
 CORNMAN.

But if this be so, another question of great and general importance remains to be considered. Is the commitment on the warrant of the brigade inspector, made by a competent authority? This must depend on the commitment itself. The question is, had the brigade inspector complete authority over the man and over the subject?

*Oliver Caulk* was the subject of enrolment; was liable to be enrolled, and if enrolled, was subject to the prescribed penalty for non-attendance; and it cannot be enquired into, whether the enrolment was regular or irregular; the course pursued, is in the mode, and by the persons authorised by the act. The brigade inspector in issuing the warrant, the constable in executing it, the keeper in detaining him in confinement, would be justified. All the matters necessary to give jurisdiction exist; residence of *Oliver Caulk*; the commission of captain *Wandell*; the notice of enrolment; the non-attendance; the notice of appeal; the delivery of enrolment by captain *Wandell* to the brigade inspector; organisation of the court of appeal for the regiment; enrollment and list of exempts delivered to the president; that the fine for non-attendance was not remitted by the court of appeals; that all these proceedings being before the brigade inspector, he issued his warrant. It must in presumption, and in the reason of the thing be, that such proceedings are final and conclusive.

Under the act of 1814, there are no exempts; there are under that of 1816, and the right of appeal granted to such exempts; the court of appeal then acted on the whole; the

1818. enrolled militia man and the exempt. The man claiming to be exempt, but who is returned to the court of appeals, as an enrolled absentee, has thus presented to him an opportunity of a hearing an appeal to a court competent to decide and to grant him relief.

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CORKMAN.

*Oliver Caulk* was a free able bodied white male person, above the age of eighteen, and under forty-five; he fell not within any exception of the act of 1814; he was liable to be enrolled as a militia man; he was enrolled as such; the law itself fixed the fine for non-attendance; he was returned to the brigade inspector, and to the president of the court of appeals; his fine was not remitted; all these facts ascertained by the legal evidence, by the brigade inspector; all these gave authority to the brigade inspector to issue his warrant; it became his duty so to do; if he refused, he rendered himself liable to punishment; he was charged with the fines not remitted, in the books of the state treasurer. It is indifferent what these proceedings are denominated, or what the tribunal be called. It is through the medium of persons appointed by law, clothed with authority, and whose proceedings from their nature must be final, when they act within the limits of the legislative jurisdiction. Call the persons what you may, judges, commissioned officers, civil courts, courts martial, the proceedings are declared to be final; they have a general jurisdiction, on a subject matter which they have not exceeded, and all that they have decided is conclusive.

The enrolment, the exempt lists, were before the court of appeal. The party might on that appeal have shewed, that he was improperly returned as an enrolled militia man, as he had declined to be enrolled, in declining to make a choice. The enrolment appealed from; the fine for non-attendance, its necessary incident, are to be considered as matters of which the party makes no complaint, to which he submits; in one word, are to be taken *pro confesso*, cannot be traversed in trespass against the officer, or questioned on a return to a *habeas corpus*.

The case of *Wise v. Withers* decides nothing but this, that all are trespassers where the proceedings are against a person not subject to the jurisdiction, as was the case there; the man not liable to be enrolled, consequently not the subject of the militia law, all was void, *coram non judice*; for the same

law which gave the jurisdiction, excepted out of this jurisdiction the individual. Militia laws courts martial are to be considered as all other laws, and all other inferior courts, the decision final when within the jurisdiction, but all void when not within that jurisdiction. The man who declines to avail himself of an opportunity offered by the law, by appeal to a tribunal competent to grant relief, to rectify the errors and mistakes of which he complains, has but little reason to complain of the injustice or hardship of the law. If those proceedings were not conclusive, all laws for training the militia would be nugatory; for who, worthy of military command, would accept of a commission which must constantly expose him to vexation and expensive suits for the faithful discharge of his official duties. Let it be understood, that though I adopt the doctrine of the conclusive nature of these proceedings to all this latitude and extent, yet I confine it to cases where the officer acts within the scope of the legal authority conferred on him; if he exceeds this, his acts are usurpation and void, and he is a trespasser. Thus understood, the military are in due subordination to the civil authority; the *service*, instead of being rendered ridiculous to honourable men, will be considered as it ought, as highly respectable and honourable.

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I will just add, that although courts will respect the religious scruples of all men, yet this respect must not carry them, in the administration of justice, to adopt principles unknown to the constitution and the laws, and subversive of the execution of laws which they have reason to observe; but courts, civil and military, and the officers who execute laws repugnant to the conscientious scruples of respectable societies, will always perform the duties with tenderness, and in a way least offensive to their sincere and honest prejudices; but still the laws must be obeyed.

Objection is made to the warrant of commitment, as not being authorised by the act for the regulation of the militia. I am well satisfied with the postponement of the consideration of this objection; as it has afforded an opportunity of considering more fully the provisions of an act forming a general system on a most important subject. A subject which, of all the arduous matters of legislation, appears from long experience, to be the most arduous and difficult.

The blending of courts of civil jurisdiction with those of a

1818. martial cast ; civil process with military mandates ; has rendered this act difficult of construction ; so as to mould its apparently jarring parts into one consistent plan.

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COMMON.

The penalties inflicted are of two kinds, those on the subject of persons enrolled, or liable to be enrolled, as militia men, and those on citizens not the subject of enrolment, as for acts not properly of military cognisance.

Of the first class are delinquents, such as *Oliver Caulk*. Of the latter class, are those citizens who are rendered liable to certain penalties specified in the act, as for selling spirituous liquors on the parade ground. Those of the first class are subject to the jurisdiction of courts martial and courts of appeal, held by military officers ; those of the latter, are delivered over to the civil authority ; for the 20th section specially provides, " that as soon as any brigade inspector shall have ascertained, that any penalty or penalties specified in the act shall have been incurred, by any person or persons not enrolled in the militia, he shall make a representation thereof to the proper alderman or justice of the peace, and the said alderman or justice, after having had the requisite proof, that any penalty or penalties had been so incurred, shall proceed to sue for and recover the same, as debts of the like amount are, or shall be by law recoverable ;" but as the penalties in one case might exceed 100 dollars, jurisdiction is given to the courts of record, " Where the executors or administrators of any person who shall have been intrusted with any books, vouchers, or other property belonging to this Commonwealth, shall have refused for twenty days after demand made, to deliver up the same to the brigade inspector, such person or persons so offending shall forfeit and pay a sum equal to double the amount of the value of the said property to be recovered by action of debt in the name of the brigade inspector in any court of record within this state."

For one penalty there is a different course taken ; for " if any person shall have knowingly sold, bought, taken, concealed, &c. any public arms, &c. and be thereof convicted before any justice or alderman, &c. he shall forfeit and pay double the value, to be ascertained by such justice or alderman, and levied at the suit of the brigade inspector, by distress and sale of the offender's goods, and for want of such distress he shall commit such offender to the common jail of the county, there to remain at the expense of the county for any time not

exceeding one month, unless such money shall have been sooner paid." 1818.

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The manner of collecting fines, incurred for non-attendance on muster days, is not very clearly expressed. "The brigade inspector shall issue a warrant under his hand and seal to any constable, commanding him to levy and collect the same, and the constable shall proceed to collect in the same manner, and with the like power and effect, as constables are required to proceed with executions, under the acts for recovery of debts and demands not exceeding 100 dollars." Did it rest on this clause alone, this warrant and commitment would be conformable to the law; but as it could not be the intention of the legislature, that the delinquent who was unable to pay should be imprisoned for life, a provision is made by the 28th section, "that in case any delinquent or delinquents shall neglect or refuse to pay the fine or penalty incurred by him or them, and in case no property shall be found, the bodies of such delinquents shall be committed, *each on a separate warrant*, to the common jail of the proper county, there to be supported at the county expense not less than one nor more than two months, at the discretion of the field officers of the regiment, or until the delinquent shall have paid the penalty incurred, or be discharged by due course of law."

This is so comprehensive in its terms as to ride over all the other special provisions; yet clearly such could not have been the intention of the legislature, for it extended not to actions of debt in courts of record, and executions issued thereon. It extends not to a case where, for want of sufficient distress, the inspector is limited to a period not exceeding one month. What then is the reasonable construction? It is to be restrained to cases of delinquency in military duties by persons enrolled or liable to be enrolled as militia men; where the person and the offence are subjects of military cognisance, and the course of proceeding is by a military tribunal or officer, and extends to no case where the remedy is by a civil tribunal, alderman, justice, or court of record, for neither of these civil jurisdictions could issue an execution in conformity thereto. For it would introduce a strange confusion, if, after a recovery of a penalty in a court of record or before a justice or alderman, a military forum should be again convened, and at their discretion change the nature of

1818. the judgment and execution. It is worthy of observation, that all delinquents on the score of military duties, are to be tried by a military power, and that all penalties incurred by persons not enrolled in the militia are delivered over to the civil power.

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In this way alone, can consistency be preserved with the special provision of the 20th section, for that does not prescribe any particular form of warrant, nor does it authorise in express terms, the brigade inspector to command the constable to levy and collect; and although the constable is to proceed to collect with like power and effect as in cases of other debts, yet this may be confined to a collection by levy and sale of goods, and not by imprisonment of the body. But in what manner is the warrant in this case to issue? How is it to be executed? The warrant from the brigade inspector in the first instance to the constable, is to contain a command to levy and collect all the fines in his bounds for non-attendance, according to the schedule containing the names and sums; and in all cases where they have not been remitted by the court of appeals, by distress and sale of the delinquent's effects, if such can be found, but if sufficient distress cannot be found, to return the same to the brigade inspector within forty days, who is to lay the return before the field officers of the regiment, whose duty it is made to exercise their discretion by adjudging the confinement, which is not to be less than one nor more than two months; and the brigade inspector is to issue a separate warrant in the case of each delinquent to the constable, to take the body and commit it to jail for the period, or until the delinquent shall have paid the penalty or be discharged by due course of law. This opinion is founded on the connection of the 20th and 23d sections. The 20th provides, "that the constable, after he receives the original warrant, under the penalty of 30 dollars, shall call upon each delinquent within twenty days, and demand payment, and if not paid within 10 days after demand he is to proceed to levy and collect the same, and within forty days he is to pay the amount of all the fines on his schedule to the brigade inspector, and if he does not do so within the specified time, he is to forfeit and pay double the amount to the brigade inspector, except only such fines as by the field officers to whose regiment the delinquent belongs, shall have been judged impracticable to collect; and the 23d provides, that in

case any delinquent shall neglect or refuse to pay the fine incurred, and in case no property shall be found to satisfy the same, then the body of such delinquent shall be committed on a separate warrant for a time, not less than one nor more than two months, at the discretion of the field officers of the regiment.

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I incline to think, that the first warrant is to be a general one, to levy and collect the whole fines incurred for non-attendance within the constable's bounds ; stating the name and sum ; and that in the general list and warrant the constable is to return to the brigade inspector the names of such as have no property to levy on ; these he is to be credited with, and all the other fines he is bound to pay over within forty days.

The first precept is in the nature of a general schedule of the fines incurred for non-attendance, and by whom ; the second is a separate and particular warrant against each individual returned as having no property, and commanding the constable to commit the body for the time prescribed, or until the fine is paid, or the party discharged by due course of law.

To the absentee from training the word delinquent is particularly applied ; he is emphatically called a delinquent in the clause inflicting the penalty ; the non-performance of a required duty is more properly called a delinquency than the commission of a forbidden act.

The warrant and commitment are not authorised by law, and the man must be liberated from his confinement.

I wonder not that the brigade inspector fell into this error, for I am free to admit, that my first impression was, that the commitment was legal, but on a more attentive consideration of the several provisions of the act, I have changed the opinion I had formed ; and adopted that which I have delivered as the only one which will reconcile all the provisions of the law, and while it preserves the particular provisions of the law, gives effect to one expressed in very general terms, and which would otherwise be totally inoperative.

Prisoner discharged.



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Philadelphia.Case of the Road from Fitzwater street to Shippen street  
in the township of Moyamensing.Saturday,  
April 4.

The act of 26th March, 1808, respecting roads in Moyamensing, does not repeal or interfere with the general road law, of 6th April, 1802, as respects that part of Moyamensing township, which is embraced by the act of 1808.

The Court will not quash the proceedings in a road case, because one of the viewers signed the report by a different surname, from that by which, through a clerical mistake, he was named in the certificate of appointment.

The Quarter Sessions, having confirmed the report, this Court will presume, that they were satisfied, that the persons who signed it, were the same as those who were appointed.

In common parlance, the word "street" is equivalent to the word, "highway."

Therefore, if the petition be for a *street*, and the report of the viewers be of a *street*, the proceedings are not vitiated thereby. A substantial compliance with the act is all that is required.

THE proceedings in this case, having been removed by *certiorari*, from the Quarter Sessions of *Philadelphia* county, to this Court, it appeared, that at *September Session*, 1815, a petition under the general road law of 1802, was presented to the Court of Quarter Sessions, for the continuation of *Spafford* street in *Moyamensing* township, from where it then terminated, to *Fitzwater* street. On the 13th *October*, viewers were appointed, who, at the ensuing session, reported that they had viewed, laid out, and returned for public use, a twenty-four feet wide street, from the north side of *Fitzwater* street to *Shippen* street, agreeably to the prayer of the petitioners. This report was signed by all the viewers except one; but one of them, who in the certificate of appointment was called *Jesse Williams*, signed the report by the name of *Jesse Williamson*.

On the 26th *December*, 1815, the report was confirmed *Nisi*, and at the following *March Session*, it was confirmed absolutely.

To these proceedings, the following exceptions were filed and argued by *Kittera*.

1. That only four of the viewers appointed by the Court, viewed the ground.
2. That the street was not laid out by the commissioners, named by the act of 26th *March*, 1808.
3. That the petition is not for a road or highway, nor is the return of the viewers, of a road or highway.

Two additional exceptions were filed, which in substance did not vary from the others.

*G. S. Cox*, argued in support of the proceedings.

The opinion of the Court was delivered by

1818.

GIBSON J. This case comes before us on a *certiorari* to *Philadelphia*.  
the Quarter Sessions of *Philadelphia*, and five exceptions are  
taken to the proceedings, only three of which are material.

Case of the  
road from  
Fitzwater  
street to  
Shippensstreet  
in the  
township of  
Moyamensing

It is objected, that this street could be laid out only by the commissioners, under the act of 26th March, 1808. This objection is without foundation. It never could have been the intention of the legislature, in passing the last mentioned act, to repeal, as respects that part of *Moyamensing* township, which is embraced by the act of 1808, the provisions of the road law. The object was to obtain a general town plan, having those advantages of regularity and unity of design, that can be obtained only by laying out at one time, all the streets and alleys at first deemed necessary. But after the general plan has been thus obtained, other streets in addition, may be found necessary, and these can be added only under the general law. No doubt, the immediate execution of the powers vested in the commissioners was contemplated; but the draught or plan of the survey directed to be made, has not yet been returned to the Quarter Sessions. In the mean time, valuable buildings have been erected on streets laid out under the road law of 1802. To say that the operation of the general road law was suspended, till the work of the commissioners should be perfected, would be attended with destructive consequences; and there is nothing in the act which looks like a repeal of it; but taxes are to be laid, and even the streets laid out by the commissioners, are to be opened and kept in repair, according to its provisions. I, therefore, consider the act of the 26th March, 1808, not only as ~~not~~ repealing, but as not interfering with the road law. Streets laid out pursuant to it, are to be valid, but it is to have no other effect.

It is objected to these proceedings, that only four of the viewers appointed by the Court, actually viewed the ground. The report is signed by five persons, four of whom are indisputably the same that were appointed. The fifth is, in the certificate of appointment, named *Jesse Williams*, the name signed to the report being *Jesse Williamson*. Hence it is inferred, that *Jesse Williamson* acted without authority. It is not contended in point of fact, that *Jesse Williamson* was not the person meant. The variance obviously arises from a mere clerical error, which might have been set right

1818. in the Quarter Sessions, if an application had been made ;  
*Philadelphia.* and we cannot suppose that Court would have confirmed  
 Case of the the report, if they had not been satisfied, that the persons  
 road from signing the report, were those who had been appointed. We  
 Fitzwater will not contend, that the Quarter Sessions have committed  
 street to error, but we will presume, in every case susceptible of pre-  
 Shippen street sumption, that every thing was rightly done. *Schuylkill*  
 in the township of fall's road, 2 Binn. 250. *Spear's road*, 4 Binn. 174.  
 Moyamensing

Exception is taken to these proceedings, that the petition is not for a road or highway, but for a street, and that the report is of a street. In common parlance, the word street, is equivalent to highway, and the very words of the act need not be pursued ; a substantial compliance with its provisions, is all that is required. Few records of proceedings of this nature, would stand the test of a construction so severe as that contended for. Reports of viewers, and frequently the petitions on which all subsequent proceedings are founded, are drawn by persons unacquainted with forms. The report in a majority of cases, passes on to confirmation without scrutiny, and even if an informality were detected in due season, the delay that would ensue from referring the matter again to the viewers, for correction, is greater than its importance deserves. But it would be intolerably mischievous, if, after the proceedings have been confirmed, any dissatisfied person should succeed in a Court of error, on the mere ground of an informality, so trivial in its nature, as that complained of here. It is therefore the opinion of the Court, that the proceedings be affirmed.

Proceedings confirmed.

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Saturday,  
April 4.487 109  
1197 321

## The Commonwealth against KING.

A *HABEAS CORPUS*, having issued to *Letitia King*, to bring before the Court, the body of *Jacob Rieval*, she returned, that she held him by the authority and direction of the executors of her deceased husband, to whom and to whose heirs and assigns, the said *Jacob* was bound as an apprentice, to learn the art and mystery of a shoemaker. By the indenture, which was dated, *August 22d*, 1815, *Jacob Rieval*, was bound to serve *John King*, his heirs, and assigns, for five years. The question was, whether an assignment of the indenture by the executors, was good.

An indenture, binding an apprentice to a man, his heirs and assigns, without naming executors, cannot be assigned by his executors.

Query, whether the executor is liable on the covenants, to provide meat, drink, and clothing, &c. though not liable on the covenant to instruct?

The opinion of the Court, delivered by *GIBSON J.*, takes so comprehensive a view of the subject, as to supercede the necessity of giving a statement of the arguments of counsel.

*Ewing*, for the relator.

*Norris* and *King*, for the defendant.

*GIBSON J.* To this writ of *habeas corpus*, *Letitia King* returns, that she holds the relator, *Jacob Rieval*, by the authority and direction of the executors of her deceased husband, to whom, and his heirs and assigns, he was bound, as an apprentice to the art and mystery of a shoemaker, by indenture, bearing date the 22d day of *August*, 1815. The binding was for five years, which have not yet elapsed. It is not contended, that the case falls within the second section of the act of 11th *April*, 1799. By that act, if the term extends to executors and administrators, the remainder of it, unexpired at the death of the master, may be assigned by the executor or administrator, to such suitable person of the trade or calling, mentioned in the indenture, as shall be approved of by the Court of Quarter Sessions of the proper county. The binding in this case, is not such as the act describes; and to construe the words "heirs and assigns," as being equivalent to executors and administrators, would make a new contract for the parties, and, in most cases defeat their actual intention. The contract is, in its nature,

1818. *Philadelphian*. fiduciary on the part of the master. The personal confidence reposed in him, is one (perhaps the chief,) ingredient in the consideration of the contract; and, however willing a parent or guardian may be, that the apprentice shall be assigned by the master himself, in whose integrity and discretion they have confidence, or remain with his family after his death, yet they may with reason, be unwilling to delegate the same authority to his executors or administrators, who may be strangers to them, or persons wholly unworthy of their confidence. The act confers an authority unknown to the common law, and we must adhere strictly to its words. But, were it otherwise, the executor acquires no interest in the residue of the term; he has a naked authority to assign with the approbation of the Court, and in the mean time, he is not entitled to the custody of the apprentice, and cannot exercise any personal authority over him. The power delegated by the act, must be exercised in a reasonable time, under all the circumstances of the case; otherwise the apprentice will be at liberty to provide for himself. Here the executors, even if the term had extended to them, have not exercised the authority in the manner prescribed; and *Letitia King*, cannot by their authority and direction, exercise a power which they have not.

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But it is contended, that the act does not change the provisions of the common law, but gives a remedy over and above it; and that the relation of apprentice and master, does not cease on the death of the latter, but that his executors are substituted in his stead, at least, for the purpose of performing on his part, all the covenants that were not merely personal. The early cases certainly went this length. In *Wadsworth v. Gye*, 1 *Sid.* 216, decided in the 16 *Car.* 2, and which has been constantly since, cited as an authority, directly contrary to what on inspection it appears to be, it was held, that the apprentice remains an apprentice to the executor, for, although he cannot instruct him, he is bound to find him in meat and drink during the term, and that the term does not determine by the death of the master, but survives him. The same case is reported in 1 *Keble*, 761, in which it is said, the Court *inclined*, that the indenture survived. In the succeeding year, *Walker v. Hull*, 1 *Lev.* 177, was decided, where it was held, that the executors are bound by the covenant of the master, to teach the apprentice

his trade, and that if they are not of the same trade, they ought to assign him to another that is. This case has been since given up, and denied to be law, in *Baxter v. Burfield*, 2 *Strange*, 1266. In *The King v. Peck*, 1 *Salk*. 66, determined in the 10 *W.* 3, we find the Judges inclining to the old notion of the apprenticeship continuing after the death of the master, at least, as to maintenance, and that although the covenant for instruction failed, yet the indenture subsisted for all other purposes between the apprentice and the executor. But in *Baxter v. Burfield*, it was decided, the binding is to the *man*, to learn his art and serve *him*, without any mention of executors, and that the purpose of the indenture is a mere personal trust, on the part of the master, the apprentice being bound on account of his integrity and ability in his profession. This case has ever since been considered, as having settled the law. And the principle is corroborated by many analogous decisions. The right of the master cannot be assigned to another, nor can he send the apprentice out of the realm, unless there be an express stipulation in the covenant, or the nature of the business to be learned, should indicate a necessity for it, and evince that it must have been in the contemplation of the parties. *Rex v. The parish of Aircles*, 12 *Mod.* 553. *Salk*. 66. *S. C.* *Rex v. Channel*, 3 *Keble*, 519. *Coventry v. Woodall*, *Hobart*, 134. The reason why the master shall not *assign*, applies with equal force to a transmission of his power to his executor, which is an assignment by operation of law. In *Massachusetts* it has been decided, that an apprentice cannot be sent out of the state. *Davis v. Coburn*, 8 *Mass. Rep.* 306. It seems to be held, however, that the executor remains liable as to covenants, to provide meat, drink, clothing, &c. although not liable on the covenant to instruct. This appears to be an absurdity, and if the point should arise again, it would, I apprehend, receive a different decision. The contract to provide for the apprentice, is grounded on the civil relation that exists between him and the master, and when that relation ceases, so should all its incidents. The covenant to maintain, is grounded on the covenant to serve, and a want of mutuality in this respect, should release both parties. On the whole, it is the opinion of the Court, that the apprentice be discharged.

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Apprentice discharged.

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4s. 112  
175 416Philadelphia.

## | SAY's executors against BARNES.

Saturday,  
April 4.

A ward, soon after arriving at age, being in bad health and anxious to remove to a milder climate, had a settlement with his guardian, received the balance in his hands, and gave him a receipt in full; without which the guardian refused to deliver up the papers belonging to the estate. *Held*, that the receipt in full was not conclusive, and did not stand in the way of a new settlement under the authority of the Orphans' Court, though there was no fraud or circumvention.

Where a guardian uses the money of his ward or neglects to invest it at proper times, he is chargeable with interest; and a reasonable rule is to strike a balance of the money in his hands at the end of every six months, and charge him with simple interest on it, allowing a reasonable sum to remain in his hands to meet contingent expenses.

A guardian is not entitled to commissions on the sums charged against him for interest, beyond what was charged in the settlement made with the ward.

Commissions are not to be deducted at the foot of the account, but from time to time as the services for which they are chargeable, are rendered.

THIS case came before the Court on an appeal from the decision of the Orphans' Court of the county of *Philadelphia*.

*Benjamin Say*, deceased, whose executors were the appellants, and the Rev. Dr. *Rogers*, were guardians of *Barnaby Barnes*, the appellee, and of his sister *Anna Maria*. Dr. *Rogers* attended to the education of the orphans, but the management of their estate, which was very considerable, was confided to Mr. *Say* solely. The guardianship commenced in the year 1795. In August, 1811, *Barnaby* was of full age, and took upon himself the guardianship of his sister. He was at that time in very delicate health, and was advised by his physician, that it was necessary to try the effect of a milder climate. He had received a tolerable education, and after having left school was placed in the counting house of Messrs. *Warders*, merchants of this city. His ill health prevented him from acquiring the usual knowledge of merchants' accounts, but he understood common arithmetic and could calculate interest. On arriving at age he was anxious to come to a settlement with his guardian, in order to procure money to bear his expenses abroad. The guardian appeared equally anxious for the settlement, as he was at that time labouring under a consumption of which he died in about twenty months after that period. There was no difference as to the sums received and paid by Mr. *Say*. The account which he exhibited was admitted to be fair and honest; but the interest account, during this long minority, was the subject on which a difference of opinion arose. Not long after the ward came of age, Dr. *Rogers*, at his request, went with him to meet Mr. *Say*, at the house of *Peter Thomson*, an intelligent scrivener and accountant, who acted on Mr. *Say's* behalf. Mr. *Say* objected to giving up the bonds, mortgages, and other papers belonging to the estate, until his account was

settled, and a receipt in full obtained from his ward. No settlement took place at that meeting, nor was a receipt given, but on the 23d *November*, 1811, the account was settled, the papers delivered to Mr. *Barnes*, and a balance in cash paid to him, on which he gave his guardian a receipt in full. With respect to his sister, who was still a minor, he did not make a final settlement, but left her account to be adjusted when she should arrive at age. Dr. *Rogers*, who was examined on the part of the appellee, declared, that he was entirely ignorant of the business, and knew nothing of the circumstances or amount of the estate, which was far greater than he had supposed, so that he could render his ward no assistance in the settlement of the account. It appeared, however, that the account exhibited by Mr. *Say* had been examined and objected to by Mr. *Barnes*, who obtained some alterations in his favour both with regard to interest and the charge of commissions. The account being settled and the cash balance paid, Mr. *Barnes* went to *Europe*, and returned in rather less than a year in better health. In the mean time, his sister's account had been settled with her former guardian, Mr. *Say*, under the direction of auditors, who allowed her more interest than had been allowed to the appellee. He, therefore, on the 20th *October*, 1812, wrote a letter to Mr. *Say*, in which he complained, that the settlement between them had been made with reluctance on his part, and at a time when he was ignorant of his rights, and at the same time informed him, that he was willing to abide by the principles on which his sister's account had been settled, and that unless this were acceded to he should have recourse to law. A meeting was the consequence of this communication, at which the parties came to no agreement. The health of Mr. *Say* continued to decline, and he died in *April*, 1813, after which Mr. *Barnes* cited his executors to settle his guardianship account in the Orphans' Court.

The auditors to whom the account was submitted, settled it every six months, and charged the guardian with interest on the balance then due to the time of the audit, and credited him on the same principle when any balance appeared to be due to him, allowing one thousand dollars for contingent expenses, and deducting his commissions on the aggregate amount at the end of the account.

This settlement having been confirmed by the Orphans' Vol. IV.—P

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1818. Court, an appeal was entered, and the following exceptions to the settlement taken.

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*First*, That the Orphans' Court ought not to have opened the account settled between the parties after the ward came of age.

*Second*, That the account confirmed by the Orphans' Court was not adjusted upon proper principles.

After argument by *Binney* and *Chauncey*, for the appellants, and *J. R. Ingersoll* and *Ingersoll*, for the appellee, the opinion of the Court was delivered by

TILGHMAN C. J. This is an appeal from the Orphans' Court on the settlement of the account of *Benjamin Say*, deceased, who was the guardian of *Barnaby Barnes*. The appellants make two objections to the settlement; 1. That the Orphan's Court ought not to have interfered with the account settled between the parties after the minor was of full age. 2. That the account adopted by the Orphans' Court, is not stated upon just principles.

1. Whether the account settled between the parties, was obligatory, will depend on the circumstances. [Here the Chief Justice stated the case.]

It is now contended, on behalf of his executors, that the receipt of *B. Barnes* is a bar to his claim, and that it would be unjust, to open the account, after the death of the guardian. I understand *Dr. Say* to have been a man of good character; neither does the case require, or my inclination lead me to any observations injurious to his memory. I am very sensible of the delicacy of the subject, and of the injustice of throwing hasty censure, on one who can no longer speak for himself. But certain principles have been established for the protection of infants, founded on great wisdom, and which must not be departed from. It is in vain to argue, that when a ward comes to full age, and makes a settlement with his guardian, attended with no circumstance of fraud, or circumvention, it is to be considered as a settlement between two persons who had never stood in the situation of guardian and ward. I see, and I feel the difference. There is no need of authority on so plain a subject. But the books are full of authority. Settlements made soon after coming to age, and especially before the ward is in possession of

*his estate*, are always viewed by the Courts, with a watchful, and even a jealous eye. Not that there is any thing wrong in making a settlement. It is what both parties should wish. But when the ward apprehends, on further reflection, that he has acted under a mistake, or ignorance of fact or law, there should be no hesitation on the part of the guardian, in submitting to a re-examination of the account. What objection can there be to it, unless papers have been lost? It should always be remembered that when a young man comes to age, he must necessarily be ignorant of his affairs, and the information which he receives must come principally from his guardian. In point of information, the parties are not on a footing. In the present instance, the settlement of an account of 15 or 16 years standing, during which period, very large sums had been received, was not an easy matter. The establishment of a rule, by which the guardian should be charged with interest, on monies either used by him on his own account, or neglected to be put out for the benefit of his ward, was a point on which there might well be a difference of opinion. It seems there was a difference: and if the ward, anxious to obtain possession of his property, and impatient to seek a better climate for the benefit of his health, consented to a principle of adjustment, which he afterwards disapproved of, I think he ought not to be held to it. Why should he? If he received less than his right, his guardian paid him no consideration for the loss. Neither is it alleged that papers were destroyed in consequence of the settlement which might expose the estate of the guardian to injury. As I understand the case, an interest account is raised on the basis furnished by Dr. Say, on the receipts and payments as they stand exhibited in his own account. Under these circumstances, I am of opinion, that the receipt signed by *Barnaby Barnes*, ought not to stand in the way of the new settlement under the authority of the Orphans' Court.

2. That being the case, it is necessary to examine the account on which the appeal is founded. The governing principle of the auditors, was, to strike a balance of the money in the hands of the guardian, at the end of every six months, and to charge him with simple interest upon that; making an allowance, however, of a thousand dollars for contingent expenses. It does not seem to me, that this rule works either

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1818. *Philadelphia.* unjustly or severely, whether the case really was, that the money was used by the guardian, or negligently retained by him. How the fact was, we are ignorant. But it must not be forgot that no one but he who had the money, can shew what became of it. It is objected that this rule is unjust, because it might often happen, that good investments could not be obtained in the course of six months. The answer is fair. Shew us that the money was really lying dead, and we give up the interest. This the counsel for the appellee declared in Court. And as most people keep their money in bank, there can be little difficulty in shewing what sums remained unemployed, and for what length of time. In the case of *Fox v. Wilcocks*, 1 Binn. 194, this Court established a principle which can never be shaken, "where a guardian, or executor, has been guilty of neglect, in not putting money out, or where he has made use of it himself, he shall be charged with interest." The only question is then, has he been charged for too long a time. Considering the state of business in this city, during the period when these monies were received, and in the absence of all testimony, which might inform us of the exact truth; considering too, that the books of the guardian are the proper sources of such testimony, I am of opinion, that the rule adopted by the auditors, was, neither severe, nor unreasonable. One or two minor objections have been made to the account. It is said, that *Benjamin Say*, ought to be allowed a commission on the aggregate of the several sums charged against him for interest, beyond what had been charged in the settlement made with his ward; because the estate has been thereby increased. True, the estate has been increased, but it does not follow, that a commission should be allowed on the increase. A commission is a compensation for services rendered; but whether the money was kept unproductive through negligence, or used by the guardian for his own profit, there was neither trouble, nor service, for which the estate should be charged. Another objection is, that those commissions concerning which there is no dispute, are deducted at the foot of the account; whereas, they should have been deducted from time to time as they were earned; and this will make some difference in the interest account.

I believe the rule in this Court has been, to allow the

commissions at the time the services were rendered; and when the guardian is charged with interest, this circumstance should be attended to. So far as that goes, the account should be rectified. In all other respects, I am of opinion, that it should stand confirmed.

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Proceedings confirmed.

WAGER *against* MILLER.

Monday,  
July 13.

CASE stated for the opinion of the Court.

On the 30th June, 1808, *William Miller*, the defendant, assigned to *James Ash* and *Abraham Garrigues*, all his estate, real, personal, and mixed, for the use of his creditors.

In this assignment was included, a quantity of household furniture, of which the assignees never took possession, but the same remained in the possession of the said *William Miller*, and was used by him in his dwelling-house, as his own goods, until the levying of the execution hereinafter mentioned.

At the Term of *March*, 1816, *Peter Wager* and *William J. Baker*, executors of *Philip Wager*, deceased, obtained a judgment in this Court, for 667 dollars 59 cents, against the said *William Miller* and *James Miller*. A *fiery facias* was issued upon the said judgment, returnable to *March* Term, 1817, under which the household furniture above-mentioned, was levied upon, and taken in execution, by the sheriff of *Philadelphia* county, on the 24th day of *March*, Anno Domini 1817, but at the instance of the defendant, no sale took place.

On the 3d *April*, 1817, the said *William Miller*, gave notice to the sheriff, that the said goods were included in his assignment to *James Ash* and *Abraham Garrigues*, that they were not his property, otherwise than for safe keeping and delivery to his said assignees, and cautioned the sheriff against any further proceedings in relation to them.

It was, therefore, agreed, that the goods should be ap-

Where goods had been assigned by an insolvent debtor, under the act of 26th March, 1808, but remained in his possession, with the permission of the assignees, for more than eight years, it was held, that they were not liable to an execution, for a debt contracted prior to the assignment, and due to a creditor, who had signed a letter of license, exempting the debtor from suits, and his property from executions, during the term of seven years after his discharge. It seems, that such length of possession would be fraudulent, with respect to a debt contracted after the discharge.

1818. praised, and an amicable action instituted, to try the validity of the levy, under the said execution.

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The question for the opinion of the Court was, whether on the preceding circumstances, the execution issued by *Peter Wager* and others, could be supported against the assignment above-mentioned.

*Rawle*, jun. for the plaintiffs. Though none of the cases in the books, in which conveyances to trustees have been deemed fraudulent and void against creditors, in consequence of the debtor's retaining possession of the property assigned, exactly resemble this, yet the principles they establish, clearly apply. The rule is now well settled, subject, however, to some exceptions, that where an absolute, unconditional assignment is made, of a chattel, possession must accompany and follow the deed; otherwise it is fraudulent and void, both at common law and under the statute of 13th *Eliz. c. 5*. Possession is not merely a badge of fraud, but *per se*, vitiates the whole transaction, and renders it void. Whatever title, therefore, vested in the assignees of *William Miller*, it is contended, was destroyed by their suffering him to remain in possession of the property assigned. In *England*, the rule of inferring fraud from the possession of a chattel by a debtor, is carried much further than in *Pennsylvania*. An execution levied upon goods which are suffered to remain in the defendant's hands, is deemed fraudulent, and will not protect them from a subsequent execution. *Rice v. Sergeant*, (a) *Bradley v. Wyndham*. (b) From sentiments of humanity, and the peculiar necessities of the country, our law does not view the mere possession of the debtor, after his goods have been levied upon, unaccompanied by any other circumstance in the same light, *Levy v. Wallis*, (c) *Water's executors v. McClellan*, (d) *Chancellor v. Phillips*. (e) The propriety of these decisions, has, however, been doubted, even in *Pennsylvania*, and in the Circuit Court of the *United States*, for this district, the English rule was, after great deliberation, adopted, *United States v. Conyngham*. (f) The same law governs the Courts of *New York*,

(a) 7 *Mod.* 37.

(b) 1 *Wils.* 44.

(c) 4 *Dall.* 167.

(d) 4 *Dall.* 208.

(e) 4 *Dall.* 213.

(f) 4 *Dall.* 358.

*Storm v. Woods.*(a) The case of an assignment differs very materially from that of an execution, and whatever may be the law in relation to the latter, it cannot be controverted, that in the former, a transfer, unsupported by possession, is generally fraudulent and void, *Wilt v. Franklin.*(b) *Dawes v. Cope.*(c) *McCallister v. Marshall.*(d) *Hamilton v. Russell.*(e) These cases, without referring to many others which might be adduced, conclusively shew, how far for the suppression of fraud, the law requires possession to attend the assignment of a chattel; and unless there is something in the insolvent law, which precludes their application, they are conclusive on the present question. The assignment was made, under the act of 26th March, 1808, which revived, with some additions, the act of 4th April, 1798,(f) for a limited time. The object of that law, was, to exempt from imprisonment an honest debtor, who had fairly and fully surrendered his estate for the use of his creditors, not to protect him in the enjoyment of it. The monstrous system of iniquity, which has been built on the basis of conveyances to friends, ostensibly for the benefit of creditors, but really for the use of the debtor, even under the sanction of the insolvent laws, is an evil of extensive prevalence, and the most injurious consequences, and Courts should lay a strong hand upon every attempt to elude the intention of the law. It is not pretended, that the conduct of the parties to the present assignment, is tainted with moral fraud; but the rule established in one case, must be that by which every analogous case is governed, and if fraud in the legal acceptation of the term, be shewn, it is no less incumbent on the Court to prevent the mischievous consequences which would flow from it. By the assignment, an incipient title was vested in the assignees of the defendant, but instead of perfecting it by taking possession of the property assigned, and converting it into money, for the use of the creditors, they permit the assignor to retain possession nearly nine years, without exercising any act of ownership over it, or in any manner interfering with the defendant's enjoyment of it. By thus neglecting to act in pursuance of their trust, it is contended, that the assignees

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(a) 11 Johns. 113.

(b) 1 Binn. 502.

(c) 4 Binn. 258.

(d) 6 Binn. 338.

(e) 1 Cranch, 309.

(f) 8 Bioren's Laws, 441.

1818. *Philadelphia.* lost the title they once possessed. The 19th section of the act declares, that any property, real or personal, which such debtor, or any other person in trust for him, at the time of his assignment, hath, or thereafter shall or may be, in any way seised or possessed of, interested in, or entitled to, in law or equity, shall be liable for his debts, and may be taken in execution, notwithstanding his discharge. Though the title to the property in question, passed to the assignees, the use and beneficial ownership remained in the assignor. The 8th section requires the assignees to close their accounts, in one year from the date of the assignment, unless the time be enlarged by the Court, or a suit be depending, or any part of the estate remain undisposed of, or any future estate or effects of the debtor, shall come into their hands, in which case, the trustees are, as soon as possible, to convert the estate or effects into money, and within three months afterwards, to distribute the same among the creditors. The trustees in the present case, came within none of these exceptions. Their controul, therefore, over these goods, ceased at the expiration of the year, and their title was lost by their having never reduced them into possession. The defendant, it is true, does not claim the goods as his own, but to every intent, they are so beneficially, and it is idle for him, to interpose on behalf of assignees, who never did, and at this moment, do not assert any claim to the property. The circumstance of the assignment having taken place under the insolvent law, cannot alter its character.

But if the transaction ought not to be viewed in this light, the property may be considered as having been acquired by the defendant, subsequent to his discharge. By the assignment, it passed to the trustees, who are accountable to the creditors generally for the value of it. It may be considered as having been sold, and purchased by the trustees, and their permitting the defendant to enjoy it, amounts to a gift. Whether the property be acquired by the bounty of the trustees, or the industry of the debtor, it is equally subject to execution. Unless an execution be sustained under such circumstances as exist in this case, it is evident, that the intention of the law may be evaded by collusion between the insolvent and his trustees, and the creditor have no effectual remedy. It is fruitless to refer him to the security which the law requires the trustees to give, for it is noto-

rious, that in many instances, no bonds are entered into, and the trustees and sureties are in many instances themselves insolvent. Nor does the penal section of the law afford any redress, because it merely punishes the breach of morals. It is manifest, that the effect of this transaction, has been to delay and hinder the creditors in the recovery of their debts, and whatever has that tendency, where the benefit accrues to the debtor, is fraudulent and void.

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*Chauncey*, for the defendant. The proceedings under the insolvent law, by virtue of which, the defendant was discharged, were fair and regular, and no fraud of a moral kind is imputed to him. Two questions arise, 1. In whom is the title to the property vested? 2. If not in *Miller*, does his possession amount to a fraud, in law? The assignment was not a voluntary one; it was compelled by the insolvent law, and the proceedings shew, that it was a good assignment. The trustees were not chosen by the debtor, but by the creditors themselves, or by the Court, if the creditors did not think proper to attend. By the assignment, the whole of the defendant's property, real, personal, and mixed, passed to these trustees, for the benefit of his creditors, and he was discharged. *Philip Wager* was a creditor before the discharge; had an opportunity of objecting to the assignees who were appointed, and actually signed a letter of license, by which the defendant was exempted from all suits, and the property he might afterwards acquire from executions, for any debt contracted, or cause of action, created previous to his discharge. He, therefore, was a party to the proceedings, under the insolvent law. What were the rights acquired by the parties in consequence of these proceedings? After having taken the preliminary steps pointed out by the act of assembly, the petitioner is compelled to execute an assignment of all his estate, to trustees nominated by the creditors, if they think proper to exercise that privilege, in whom the title immediately vests, for the benefit of the creditors. At the moment the assignment is made, the title passes out of the debtor and vests in the assignees, whether they accept the trust or not; he no longer possesses any controul over the property, *Cooper v. Henderson*.(a) If the trus-

(a) 6 Binn. 189.



1818. *Philadelph.* tées refuse to act, the Court are authorised by the 3d section of the law, to appoint others in their room; and with a view to secure the interests of the creditors, every trustee, before he can act as such, is obliged, by the same section, to give bond for the faithful performance of his duties. If, therefore, the property once passed out of the debtor, it could never revert; it has been once appropriated to the satisfaction of his debts, and to the trustees must the creditors look for a faithful application of it. To them the trustees are liable to account, and they may compel them to take possession of the property, and distribute the proceeds among them, by pursuing the modes pointed out by the act of assembly. They are the trustees of *Philip Wager*, and the other creditors of the defendant, and if he has improperly remained in possession of the goods, it was through their own negligence, in not compelling the trustees to do their duty. They are accountable for their value.

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2. There is nothing fraudulent in the defendant's possession. It is a matter between him and his trustees, who have permitted it without any impropriety on his part. That fraud is generally to be presumed, where the possession of a chattel remains in the assignor after assignment, is not denied; but the rule is not invariable, possession may be explained. Where an insolvent executes a *bona fide* assignment, for the benefit of all his creditors, and delivers a single article, for example a silver cup, in the name of the whole, and remains in possession of the remainder, at the request and for the benefit of his assignees, such possession is not fraudulent, *Fredenburg v. White*, (a) for there the possession accords with the intent of the assignment. Possession is only *prima facie* evidence of fraud, therefore, where it is consistent with the face of the deed, and the object is not to defeat creditors, it affords no evidence of fraud, *Beals v. Guernsey*, (b) *M'Instry v. Tanner*, (c) In the present instance, the possession of *Miller* is not inconsistent with his conveyance; it is with the permission of his trustees, and for their use, and the use of the plaintiff and the other creditors. The trustees are entitled, at any moment they please, to take the property out of his hands, and if they have been guilty of an impropriety, in suffering him to retain it so long,

(a) 1 Johns. Ca. 156.  
(b) 8 Johns. Rep. 448.

(c) 9 Johns. Rep. 135.

it is in the power of the creditors to compel them to do their duty, and if they still neglect to do so, the Court will appoint others in their place. 1818. *Philadelphia.*

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The opinion of the Court was delivered by

TILGHMAN C. J. The plaintiffs, who are the executors of *Philip Wager*, deceased, levied on a quantity of household furniture in possession of the defendant, by virtue of a *fiery facias* issued upon a judgment obtained against him for a debt due to the said *Philip Wager*. The defendant does not claim the property *as his own*, but says, that he holds it for those persons to whom he assigned it in trust for his creditors, when he was discharged by virtue of an insolvent act passed the 26th *March*, 1808, so that the dispute is in fact between those assignees and the plaintiff. *Philip Wager* was a creditor of the defendant at the time of his discharge, and the debt on which the plaintiff obtained judgment was then due to him. The assignment was therefore in trust for *Philip Wager* and the other creditors. There is something peculiar in the act of 26th *March*, 1808. It revives an expired act passed 4th *April*, 1798, for one year, with this addition, that the Court who discharged the insolvent debtor might, with the consent expressed in writing of a majority in number and value of his creditors residing in the *United States*, or having a known attorney therein, make or order, that the debtor should be released from *all suits*, and his property acquired after his discharge be exempted from *all executions* for debts contracted before his discharge, for the term of seven years next succeeding his discharge. Such consent was given, and such an order made, in the present instance. And *Philip Wager* was one of the creditors who consented, so that he was immediately a party to the proceedings under the insolvent law. The cases cited by the plaintiff's counsel establish the well known principle, that a transfer of chattels should be accompanied with and followed by *possession*, otherwise there is presumption of fraud under the statute 13 *Eliz*. This is the general principle, but if the possession remains in the grantor, it is not such undeniable evidence of fraud as admits of no explanation. A stranger purchasing household goods sold by the sheriff on an execution against *A*, may leave them in the possession of *A*, *on loan*, and it will not be fraudulent. But if a creditor of *A*, had received a bill of

1818. sale from *A*, and left the goods in his possession, it would have been a fraud. This distinction will be found in the cases of *Putnam v. Wylie*, 8 *Johns.* 337, and *M'Instry v. Tanner*, 9 *Johns.* 135. There are many other instances in which the presumption arising from possession may be rebutted. If the dispute had been between a creditor of the defendant, for a debt contracted *after* his discharge by the insolvent law, and his assignees under that law, I should think that the length of time for which the defendant has been suffered to keep possession of his goods would be sufficient evidence of fraud. But the case between *Philip Wager's* executors and the assignees is very different. Those assignees are the trustees of *Philip Wager and the other creditors*, and received a conveyance of all the defendant's effects for the benefit of all. The defendant, therefore, when he holds for his assignees holds for all his creditors. If those assignees have done wrong in suffering the goods to remain in the defendant's possession they are accountable to the creditors. But no one creditor can avail himself of that wrong, *to the injury of the others*. So far as concerns *Philip Wager* no presumption of fraud arises from the defendant's possession, because that possession was by the permission of *Wager's own trustee*. The case is distinguishable, therefore, from all those which have been cited for the plaintiff, and does not fall within the principle established by them. I am of opinion, that the property vested in the assignees at the time of the defendant's discharge, remains in them for the benefit of all the creditors entitled to claim under the assignment; and that with respect to *all those creditors* the possession of the defendant is fair. That being the case, the goods, not being the property of the defendant, were not subject to the plaintiff's execution.

*Philadelphia.*

WAGER  
v.  
MILLER.

1818.

Philadelphia.

The Commonwealth *against* The Commissioners of  
Philadelphia County.

Monday,  
July 13.

AN alternative *mandamus* had issued to the defendants on a former day at the suggestion of *William Thackara*, commanding them to draw an order in his favour on the county treasurer for interest on a certain draft, which they had formerly drawn, and which had been accepted by the treasurer, or to shew cause to the contrary.

The Court will not grant a *mandamus* to the county commissioners to compel the payment of interest on an order drawn by them on the county treasurer.

*Thackara* claimed interest upon his bill for plaistering done to the state-house, amounting to 590 dollars, from the 27th May, 1817, to the 6th January, 1818, when the principal sum was paid; and now *Ewing*, on his behalf, moved for a peremptory *mandamus* to compel payment.

*Daniel B. Lippard*, the county treasurer, who was examined, stated, that the order had been accepted by him; that it was not paid, because the auditors had refused to allow similar payments, (on account of repairs done to the state-house,) in the commissioners' accounts; that the commissioners promised to indemnify him for not paying the order; that when he came into office, the county was in debt more than 100,000 dollars; that the commissioners drew orders payable at future days, and when they were unable to pay them, they were renewed with the interest included; that he understood it had been the practice to pay interest when orders were not punctually paid; and that the commissioners thought *Thackara* had already received more than he was entitled to.

On his cross-examination he said, that the debt of 100,000 dollars had all been paid except about 5000 dollars; that the county was in debt when this order fell due; that the commissioners had borrowed 26,000 dollars of the banks, and that the orders were all paid as soon as this Court decided the case of *Gilbert*.

*Delany*, for the commissioners, mentioned the cases of *The Commonwealth ex rel. George Fox*, and *Same ex rel. Hannah Fox v. The County Commissioners*, in which, rules

1818. to shew cause why a *mandamus* should not issue to compel the payment of interest, had, after argument, been discharged by the Court.

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county.

*Ewing*, in support of his motion, urged, that as the principal was regularly due on the 27th May, 1817, it ought on the general principle to bear interest from that day; that it had been decided in the case of *Milne v. Rempublicam*,<sup>(a)</sup> that the Commonwealth was liable for interest, and there could be no reason why the county commissioners should stand upon higher ground; that the cases referred to by the opposite counsel, were now brought forward for the first time, and no opportunity had been afforded to inquire into their particular circumstances; that they were, however, different from this, which was the case of an accepted order, and such a case had never before been brought before the Court.

*Delany* was about to reply, when the Court stopped him.

PER CURIAM. We have never given the extraordinary remedy of *mandamuses* to compel the payment of interest on an order of this kind. On the contrary, it was refused in *Mr. Fox's* case. We believe the custom throughout the state has been not to pay interest, and those persons who deal with the commissioners understand, that the time of payment depends on the state of the treasury. If the relator has any other remedy he is at liberty to pursue it; but it is the opinion of this Court, that a peremptory *mandamus* should not be granted.

Peremptory *mandamus* refused.

(a) 3 *Yeates*, 102.

1818.

Philadelphia.

## | The Commonwealth against TILGHMAN.

Monday,  
July 13.

THE defendant had been indicted in the Mayor's Court of the city of *Philadelphia*, under the fifth section of the act of 31st *March*, 1806, entitled, "an act to restrain the horrid practice of duelling." The indictment was removed to this Court, and tried on the 16th *January*, 1818, before GIBSON J. when the jury returned a verdict of *not guilty*, but directed the costs to be paid by the defendant.

On the last day of the Term succeeding the trial, (*March* Term,) *P. A. Browne*, for the Commonwealth, prayed that judgment might be entered on the verdict; and at an adjourned Court held on the 18th *April*, *C. J. Ingersoll*, for the defendant, moved for a rule to shew cause why judgment should not be entered without costs; which was then opposed, but on the suggestion of his honour Judge DUNCAN, the discussion was agreed to be postponed until the sitting of the Court in *July*.

In a criminal case the Court will receive a motion in arrest of judgment at any time during the Term. If a defendant be acquitted on an indictment, founded on the act of 31st *March*, 1806, to restrain the practice of duelling, the jury may direct, that he shall pay the costs, although the indictment be defective.

4 SR	127
23 SC	* 70
4 SR	127
25 SC	* 571

It was now contended on the part of the Commonwealth as a previous question, that the motion was too late, the rule which requires motions of this kind to be made within the first four days of the Term succeeding the trial, applying as well to criminal as to civil cases.

To this it was answered, that the prosecuting officer by waiting until the last day of the Term had admitted, that the motion might be made at any time within the Term, and as the Court held on the 18th *April*, was a continuation of *March* Term, the motion was in time. In civil cases, the motion should regularly be made within the first four days of the Term, but in criminal cases, the Court might at their discretion receive it at any time.

PER CURIAM. (Absent TILGHMAN C. J.) Let the argument on the rule to shew cause proceed. In a criminal case the Court will receive a motion in arrest of judgment at any time within the Term. It is not necessary, that it should be made within the four days. These rules are not to be rigidly

1818. enforced in criminal cases where injustice would be the consequence of doing so.  
*Philadelphia.*

The Commonwealth  
 v.  
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The leading features of the argument, on the rule to shew cause, being noticed in the opinion of the Court, it is unnecessary to detail them.

TILGHMAN C. J. did not sit during the argument.

The opinion of the Court was delivered by

GIBSON J. The powers delegated to juries, by the act of 1805, to regulate the payment of costs on indictments, if exercised with proper discretion, will prove highly beneficial. The subjecting a defendant, who has been acquitted, to the payment of costs, at first view, may appear unjust. We attach to an acquittal, the idea of perfect innocence, and it is perhaps right, it should generally be considered so. But when we reflect, that by the common law, a defendant, though acquitted, always paid costs, and that in this state, the law continued to be so, up to the 20th March, 1797, when it was changed by act of assembly, we may, perhaps, view the case of a defendant, acquitted of actual crime, but whose conduct may have been reprehensible in some respects, or whose innocence may have been doubtful, as not a very hard one, when left precisely as it was at the common law. The act of 1797, and that of 1805, are in *pari materia*, and to be taken together. Independent of technical construction, the only reason of apparent weight, in support of the motion, is, that a verdict of acquittal, on a defective indictment, would put the defendant in a worse condition than a conviction; as in the latter case he might get clear of the costs, by having the judgment arrested. This is very true; but the same thing often happened before the legislature interfered at all on the subject, and besides, the defendant has it in his power, now, as he always had, to put an end to the prosecution, before trial, by a demurrer, or a motion to quash; and if he be acquitted under circumstances of disadvantage, it is his own fault. There is, therefore, no hardship in the case; nor is there any absurdity in a defendant, in such case, being subjected to costs. The judgment is not on the indictment, but on something collateral to it. The defendant is not punished for a matter of which he stood indicted;

(for he is acquitted of every thing of that sort,) though, on account of something, of which he was not indicted, some impropriety of conduct, or ground of suspicion, which the verdict of the jury has fastened on him, the statute law refuses to interfere in his behalf, and leaves him as he stood at the common law. What matters it, then, whether the crime of which he was indicted, (which is the direct accusation,) be well charged or not? He is not in a worse condition, than if he had been acquitted on a perfectly good indictment. I grant, that a statute imposing costs, is penal in its nature, and must be construed strictly; and this is the strongest point of the argument. Hence, it is said, if the defendant be not indicted of an *offence*, according to the legal and technical meaning of the word, he is not subjected to the power of the jury. The first section of the act of 1805, after providing, that the grand jury returning a bill *ignoramus*, in any "*prosecution*," except in case of felony, shall decide and certify, whether the county or the prosecutor shall pay the costs, proceeds to state, that "in all cases of acquittal by the petit jury, on indictments for the *offences aforesaid*, the jury trying the same, shall determine by their verdict, whether the county or the prosecutor, or the defendant, shall pay the costs of prosecution." What is the import here of the word *offences*? No offences are previously mentioned except felonies, which are entirely excluded from the operation of the act; *prosecutions*, however, are mentioned, to which only the word offences, used as it is, relatively, can refer. And this fixes the meaning attached to this word by the legislature; it is equivalent to *prosecutions*; and, therefore, the distinction endeavoured to be drawn between this case and *The Commonwealth v. Harkness*,<sup>(a)</sup> entirely fails. Here certainly was a prosecution, and that brings the case within the letter. But were it otherwise, I am not aware, the word offence, like that of crime or misdemeanour, has a technical meaning, or that it intrinsically imports the perpetration of an act, punishable by the criminal laws of the country. There may, I apprehend, be acts, such as certain kinds of fraud, that are offensive to morality, that nevertheless are not indictable; though it is a general maxim, that every thing *contra bonos mores*, is indictable. The word, therefore, does not, *ex vi termini*,

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1818. import an act, that is a crime or misdemeanour. I cannot distinguish *Harkness's* case from the present. There is but one reason for fixing costs on a prosecutor, that does not apply with equal force to the case of a defendant, and it is, that the prosecuting of a defective indictment, is rather an aggravation than an extenuation of malicious conduct ; but it is a circumstance, that only marks the greater extent and degree of misconduct, and has nothing to do with the principle on which punishment is to be inflicted, where it cannot be graduated to the exact demerit of the party. Wherever misconduct may be fairly imputed, either to a prosecutor or a defendant, they respectively become obnoxious to this kind of legal animadversion, although neither guilty of, nor technically charged with a crime. It is very clear, that all the counts in the indictment are bad ; but, as we are of opinion that cannot avail the defendant, the rule must be discharged.

Rule discharged.

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MURRAY *against* GARRETSON.

Monday,  
July 13.

If a plaintiff in ejectment in the form prescribed by the acts of 21st March, 1806, and 13th April, 1807, convey the title pending the suit, he may nevertheless proceed to recover damages and costs.

ON the trial of this cause, which was an ejectment in the form prescribed by the acts of assembly of 21st March, 1806, and 13th April, 1807, before GIBSON J. at *Nisi Prius*, it appeared in evidence, that during the pendency of the suit, the plaintiff had conveyed the title to another person, whereupon the defendant moved for a nonsuit, which his Honour directed to be entered, with leave to the plaintiff to move to take it off, if the Court in Bank should be of opinion, that he was entitled to proceed to recover damages and costs, notwithstanding the title was out of him at the time of the trial.

*Bradford* and *Ingersoll*, in support of the motion. This question lies within a narrow compass. It is, whether a plaintiff in ejectment, in the present form of that action, who has parted with the title, pending the suit, can recover damages and costs. Under the old form he unquestionably could. The action formerly embraced two objects, 1. The

trial of the title, as respected the right of possession. 2. The recovery of damages, real or nominal. After having assigned the title, he could no longer claim the possession, but his right to damages for the trespass remained unimpaired. This point is perfectly settled, both in *England* and in this country. 1818. *Philadelphia.*  
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**v.**  
**GARRISON.**

In *Lessee of Turner v. Grey*, (a) the lessor of the plaintiff, who was tenant for life, died pending the suit. The Court, however, refused to stay proceedings, because, although the lessor's title was extinct, and the possession could not be recovered, yet the plaintiff was entitled to damages and costs. If after a recovery in ejectment, the lessor convey the premises to the tenant, he may nevertheless maintain trespass for the mesne profits. *Fenn v. Stille*. (b) The Circuit Court of the *United States*, for the *Pennsylvania* District, in the case of the *Lessee of Bowne v. Galloway*, have also decided, that a plaintiff in ejectment may recover damages and costs, though he has conveyed the estate after action brought. Unless, therefore, these authorities are affected by the acts of assembly introducing a new form of action, the question is placed beyond controversy. The only alterations introduced by these acts are in matter of form; the essential qualities of the action are the same. The object of the legislature was to ascertain the land in dispute with more certainty than existed in the old form by declaration, not to deprive the plaintiff of any of the beneficial consequences of the remedy. After having parted with the title, he has voluntarily relinquished one of those consequences, but the trespass still remains; and if under such circumstances he could not recover damages and costs, he would derive no advantage; on the contrary, he would sustain an injury from the action which he had a clear right to commence.

*Milnor and Condry* against the motion. The relinquishment of the title was in this instance the voluntary act of the plaintiff, which distinguishes it from the case in *Strange*, where the lessor's title was determined by his death. Formerly too it was thought, that mesne profits might be recovered in ejectment, and though it has since been determined otherwise, that opinion might have prevailed when the case in

(a) 2 Str. 1056.

(b) 1 Yeates, 154.

1818. *Strange* was decided. But, however conclusive the authorities cited against us might have been formerly, they have lost their force since the introduction of a new mode of proceeding in ejectment. The present and the ancient form differ materially. In the old form a trespass was complained of; there was therefore a scintilla of right to recover nominal damages and costs; but in the form of action now in use, there is no complaint of a trespass; it involves the trial of the title alone; the plaintiff complains of nothing, but that the defendant is in possession of land, the title to which is in him. When therefore the plaintiff released the substantial or more properly speaking the only ground of his action, he released every thing. The legislature in taking away the old mode of proceeding took away all its consequences.

The opinion of the Court was delivered by

DUNCAN J. This was an ejectment by writ, pursuant to the act of 21st *March*, 1806, and 13th *April*, 1807. The plaintiff shewed title in himself at the time of the commencement of the action, and the defendant produced in evidence a conveyance by a third person of the premises subsequent thereto. The opinion of the Judge who tried the cause was taken, whether the plaintiff could proceed to recover damages and costs, the title being out of him at the time of the trial. The Judge expressed an opinion that he could not, whereupon the plaintiff suffered a nonsuit, with an understanding, that the Court in Bank should be moved to take it off, if they should be of opinion that the plaintiff could recover damages and costs.

In order to a right understanding of this question, it may be proper to consider how the law stood under the form of ejectment by declaration, and whether any alteration is made by these acts of assembly.

Originally the plaintiff in ejectment recovered damages only in this action, because terms for years were so entirely at the common law in the power of the freeholder, were generally so short that they often expired before the suit could be determined; but when they began to extend to a great length, necessarily and in reason the remedy was rendered commensurate with the injury, and if he made out a title to a term subsisting at the time of trial, the judgment was not only for the damages, but *quod recuperet terminum*. The

original mode was by writ, of which there were two forms, 1818.  
 that of *ejectione firmæ*, and that of *quare ejicit infra terminum*. *Philadelphia.*  
*Runnington, Ejectment*, 4, 404. The mode by declaration *MURRAY*  
 is said to have been first introduced in Chief Justice ROLLE's *v.*  
 time, and is in the nature of a precept to compel the tenant *GARRETSON.*  
 to appear in Court. *Smith v. Jones*, 8 *Mod.* 119. This in-  
 vention, with its subsequent improvements, greatly facilitated  
 the remedy for the recovery of the possession of lands, whe-  
 ther freehold or terms for years, being in the power of the  
 Court; and it has been so modelled as was best adapted to  
 the administration of justice, and to ease the parties in the  
 recovery of their rights. This was a mixed action, in which  
 not only possession was recovered, but damages; it was not  
 a real action; the actions are *diverso intuitu*; are not brought  
 for the same purposes, or for the same interests. A real  
 action can only be brought for the freehold; but ejectment  
 may be brought for a term of years. It is not decisive of the  
 right between the parties, the party is only restored to his pos-  
 session; he may recover against a wrong-doer on the strength  
 of his prior possession; nay he may recover against the real  
 owner, who forcibly dispossesses him, and who would then  
 be put to his ejectment for the recovery of the possession.  
 When the remedy was by writ, the party recovered his term  
 again, and damages also if the term was not ended; if it was  
 ended, the damages only; yet if the term expired, pending  
 the writ, the suit did not abate. *F. N. B.* 107. *T.* 7.

If the term expire pending the suit, the plaintiff cannot  
 recover the possession, because the Court cannot give judg-  
 ment for the land when it appears on the face of the record,  
 that the title to it is determined, yet he shall have judgment  
 for the damages, because the trespass remains as before. As  
 if an ejectment be brought, and the demise laid on the 1st  
*October*, when the plaintiff has title; suppose an estate for  
 another's life, and on the 1st *January*, *cestuy qui vie*, dies,  
 when the title appears to be in the defendant, the plaintiff  
 may proceed in his action and recover his damages, though  
 not the possession, because that must belong to the defend-  
 ant. The plaintiff is entitled to damages, because the de-  
 fendant unjustly held the possession at the time the action  
 was brought. *Runnington*, 404. So where the lessor of the  
 plaintiff claims as tenant for life and dies, the plaintiff may  
 still proceed for damages and costs, although his title is at an

1818. end. *Turner's lessee v. Grey et al.* 2 Str. 1056. Co. Litt. 285. Philadelphia.

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So where the term laid in the declaration expires during the pendency of the suit, the plaintiff may still proceed for damages and costs. *Lessee of Boume v. Galloway*, Circuit Court of the *United States* for this District. Nor can I see any distinction, whether the title expires by its own limitation, by death, or by the act or conveyance of the party. During the pendency of the ejectment the party's necessities may compel him to sell, or it may suit his convenience so to do, or there may be a sale by the sheriff. It would be manifestly unjust, that he who had a good cause of action for two things, damages and the possession, because he had parted with his title to one, should lose both. The judgments are distinct for the term, and for the damages and costs. Shall he who has been unjustly dispossessed of his property, who had a good cause of action when he commenced it, be obliged, to his own manifest injury, not to part with the title until he obtains a judgment, or if he does, he shall not only give up the damages for its unjust detention, but his costs and more shall be obliged to pay the costs of the wrong-doer.

The reason why, after there is an end of the title of the plaintiff pending the ejectment, he may recover damages and costs, is, because the defendant unjustly withheld the possession, at the time the action was brought. It would appear in principle and in justice, that this reason held equally in all cases where there is an end of such title, let its distinction arise from what cause it may.

The right to damages for the tort, for withholding the possession, remains unimpaired, by assignment of the title to the thing itself to the defendant, and the rule in all actions is, that the plaintiff shall recover according to the right which he had at the time of action brought. Pending an action for the mesne profits, a conveyance of the premises to the defendant, does not operate as a release, or preclude the plaintiff from recovery. *Fenn v. Stille*, 1 *Teates*, 154. The damages do not depend on the privity of estate.

The acts of assembly prescribing the writ of ejectment, instead of procees by declaration, make no alteration in the parties' rights. The alteration is in form alone, not in substance. It is a substitution of real instead of nominal parties; it is laying aside the fiction and nothing more. The issue not guilty, the mode of trial, the evidence, the verdict, the

judgment, and the execution, are the same. Indeed, the legislature, aware that difficulties might arise in the construction of the act of *March*, 1806, in the subsequent session, 13th *April*, 1807, declare that, "the writ of ejectment prescribed in the act, to which this is a supplement, shall issue in all cases, where lands, tenements, and hereditaments are claimed, and give remedy as fully and effectually as in ejectments, in the form heretofore used." These acts introduce no new rule, but instead of the form then in use, furnish a different form. The remedy is to be the same as in the form theretofore used; the name and substance of ejectment are preserved; the form only changed. It is the uniform practice in this form of action, to take the verdict for the plaintiff, six cents damages and six cents costs.

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It appears, therefore, to the Court, that though judgment could not be given for the possession, yet the plaintiff, notwithstanding his conveyance, could proceed to recover in this action, nominal damages, and the full costs.

Nonsuit set aside.

*! THOMPSON against WHITE.*

*Monday,*  
*July 13.*

A RULE was obtained on a former day, by the defendant, to shew cause why the appeal from an award of arbitrators in his favour, should not be dismissed, and at the same time, the plaintiff obtained a rule, to shew cause why the award should not be set aside.

An affidavit by an appellant, under the 11th section of the act of 20th March, 1810, "that it is not for the purpose of delay such appeal is entered, but because he believes injustice has been done," is not sufficient. The affidavit must

*P. A. Browne and Sergeant*, for the defendant, insisted, that the plaintiff had not entered his appeal, conformably to the act of assembly, the 11th section of which, required of the appellant, an oath or affirmation, that the appeal was not

contain the word "*firmly*," applied to the appellant's belief, or something equal to it in substance.

When the jurisdiction of the arbitrators has completely attached, the cause is out of Court, and the Court cannot enquire into the proceedings before the arbitrators. The only remedy is by appeal.

The Court may enquire of those things which the law requires to be done, before the jurisdiction vests.

If it should appear on the face of the award, that the arbitrators have exceeded their jurisdiction, or that the award is contrary to law, it is subject to reversal on a writ of error, if the suit be depending in an inferior Court; and if depending in this Court, it may be set aside.

Query, Whether an inferior Court can set aside an award in such cases?

1818. entered for the purpose of delay, "but because such party  
*Philadelphia.* *firmly* believed injustice had been done." The nature and  
 THOMPSON degree of belief, existing in the mind of the appellant, are  
 v. thus pointed out, and the plaintiff having only sworn, that he  
 WHITE. *believes* injustice has been done, has come within neither the  
 language nor the meaning of the act. In the arbitration law  
 of 20th March, 1810, an oath is for the first time introduced,  
 and it is evident, the legislature meant to exclude light in-  
 considerate swearing, in the common hacknied forms, which  
 is too frequent and little regarded. Mere belief, does not  
 imply absolute conviction, for the degrees of belief, says Dr.  
 REID, vol. i. p. 270, vary from the slightest suspicion, to  
 the fullest assurance. Dr. JOHNSON makes *faith* synonymous  
 with *firm* belief, and thus recognises its different degrees.  
 It is upon this idea that the present argument is founded,  
 for though the legislature may be considered as having pre-  
 scribed a form of oath, yet it is not now contended, that  
 words of equal or greater strength would not be sufficient.  
 It was intended that men should reflect, and not take an  
 oath except upon mature deliberation and firm conviction.  
 This construction of the law has received the sanction of the  
 Court of Common Pleas of *Philadelphia* county, in the case  
 of *Bradley v. Eccles.*(a)

*Tilghman* and *Binney*, for the plaintiff, after having ex-  
 hibited nine affidavits, containing the words, "*he believes*,"  
 and four containing the words, "*he verily believes*," argued  
 that this was an attempt to deprive a party of trial by jury,  
 upon a nice metaphysical distinction. If there has been an  
 error, it is one of the prothonotary, who drew up the affida-  
 vit, in conformity with what he considered the practice. It  
 proceeded from no want of confidence in the appellant, as to  
 the firmness of his belief. If the present motion is sustained,  
 a great number of appeals must fall to the ground. The  
 legislature did not intend to prescribe a form of oath, but  
 merely to declare what substantially should be done. In  
 common understanding, there is no distinction between the  
 different gradations of belief. Belief is generally understood  
 to mean an honest conviction of the mind. The distinction  
 is entirely metaphysical, and even Dr. JOHNSON, who has  
 been referred to by the opposite side, defines, "to believe,"

(a) 1 *Brown's Rep.* 258.

“to have a *firm* persuasion of any thing.” There has been 1818.  
 in this case, a substantial compliance with the law, and as *Philadelphia*.  
 the Court is bound to construe it liberally in favour of ap- *THOMPSON*  
 peals, that is sufficient. *Jones v. Badger.*(a) *v.*  
*WHITE.*

The opinion of the Court was delivered by

TILGHMAN C. J. The act of assembly gives an appeal under certain rules, regulations, and restrictions, *viz.* The appellant shall swear or affirm, “that it is not for the purpose of delay such appeal is entered, but because he *firmly believes* injustice has been done.” The appellant in the present case, has simply expressed his *belief*, omitting the word *firmly*. The question is, whether the appeal be entered agreeably to the law. This Court have construed the act of assembly liberally, in favour of appeals, because by so doing they supported the trial by jury; but they never have assumed and never will assume the right of frustrating, what appears to them to be the meaning of the law. The direction here is, that the appellant shall swear, he *firmly believes*, &c. Is there no meaning in the word *firmly*? It is a strong expression, and seems to have been intended to put the appellant on his guard. He is to consider his case well, and not to appeal, unless under a strong conviction that injustice had been done. If we say that the word *firmly* may be entirely omitted, without putting any thing tantamount in its place, we must say, at the same time, that it is impossible to have any other than a *firm* belief; or, in other words, that all belief is equal. Without recurring to the books of metaphysicians, let any man of plain common sense, examine the operations of his own mind, he will assuredly find, that on different subjects his belief is different. I have a *firm* belief, that the moon revolves round the earth. I may believe too, that there are mountains and vallies in the moon; but this belief is not so strong, because the evidence is weaker. I firmly believe that *Bonaparte* is in the island of *St. Helena*; but as to the state of his health, I may have my belief; but it cannot be called firm, because the evidence is not clear. The legislature certainly affixed some meaning to the word, and, therefore, we cannot dispense with it, or something equal to it in substance. When we come to consider what shall be equal to it in substance, we may adhere

(a) 5 Binn. 461.



1818. to our principle of *liberal construction*. Several affidavits have been cited with the word *verily*. Is that sufficient? I think it is. *Verily* is as strong a word as *firmly*. We are not called upon to measure the exact degree in which the mind assents. If it be a firm or strong assent, it is within the meaning of the law. But as this affidavit puts the matter simply on the appellant's *belief*, it is the opinion of the Court, that the law has not been complied with, and, therefore, the appeal must be dismissed.

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*Keemle*, for the plaintiff, then stated the exception, on which the motion to set aside the award was grounded, which, at the request of the Court, he reduced to writing. It was, that the arbitrators had examined a material witness on the part of the defendant, in the absence of the plaintiff, and without notice to him, permitting the defendant to ask him several questions.

*P. A. Browne* and *Sergeant*, objected to the Court's hearing any exception of the nature of that now offered. They admitted, that if there were error on the face of the proceedings, it might be taken advantage of; but for matters *dehors* the record, the only remedy was an appeal. Whether under the arbitration law, there is no other remedy than an appeal, is certainly a question of great magnitude, but it is a question without difficulty. That inconveniences will result from such a doctrine, cannot be denied, but where is the rule, decision, or law, that is perfectly free from inconvenience and injustice? The legislature evidently intended to establish a tribunal, independent of the Court as to the decision, both of the law and the fact. The act of 1810, differs very materially from that of 1705, which rendered it necessary that the award should be *approved by the Court*. And even under that act, no exceptions on matters of fact, could be sustained, unless they were filed within *four* days, and were verified by oath. The act of 1810, far from calling for the approbation of the Court, declares, that an award of arbitrators, as soon as it is entered on the docket of the prothonotary, shall have the effect of a judgment, until reversed on an appeal.(a) When the award is returned, it must appear to be within the rule of reference; viz. on the matters

(a) *Purd. Dig.* 14.

submitted to the arbitrators; but with respect to what was done *before the arbitrators*, the Court has no power to interfere. On the principle necessary to support the present exception, the Court may be called upon to review the proceedings of arbitrators, upon all exceptions to evidence, and frequently to overhaul the whole case, the effect of which, would be entirely to destroy the independent character of the tribunal. If the legislature intended that the proceedings of arbitrators should be subject to revision, in any other manner than by appeal, they would have used language expressive of that intention, as was done in the act of 1705, when they required the approbation of the Court, to give validity to an award.

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*Tilghman and Binney*, contra. Whether the arbitration law offers to a dissatisfied party, no other remedy than an appeal, for the misconduct of arbitrators, or for any reason, is a question of the highest importance. If it does not, the case is unique, for in all other cases of awards, the conduct of the arbitrators may be enquired into. In cases of arbitration bond, the parties are bound by the judgment of the arbitrators fairly exercised; but if there has been any corruption or legal misconduct, it may be examined. There is nothing in this law, to make awards under it, different from awards out of Court. The act points out the remedy by appeal, but does not exclude, either by words or by implication, a remedy in the usual manner. This Court has a superintending power over all inferior tribunals, and if they discover improper conduct in the arbitrators, or in the prothonotary, in appointing improper persons, it is certainly competent to them to interfere. If the award cannot be examined in this way, it can never be questioned; because, the time for an appeal having elapsed, the judgment becomes absolute.

On the following day, the opinion of the Court was delivered by

TILGHMAN C. J. In this case, an arbitration was entered at the request of the plaintiff, under the act of 20th March, 1810, entitled, "An Act regulating Arbitrations." The arbitrators made an award in favour of the defendant, which was filed in the office of the prothonotary. The plaintiff en-

1818. *Philadelphia*. tered an appeal; but not having made the oath required by law, the appeal has been dismissed. The plaintiff now expects to the award, and moves the Court to set it aside, because, as he alleges, the arbitrators examined a material witness on the part of the defendant, he (the plaintiff) being absent, and having no notice of an intention to examine such witness. A question has been made, whether the Court ought to receive any evidence of the proceedings before the arbitrators, except what appears in the record; and whether for the cause assigned by the plaintiff, we have any right to set aside the award? In arbitrations under the act of 1705, the Court were in the constant practice of hearing parol evidence, and of setting aside awards where the arbitrators had conducted themselves improperly, or where they had made plain mistakes in law or fact. Concerning the exercise of this power, there was no room for doubt, because the act required that the award should be *approved by the Court*. But the act of March, 1810, has introduced a new system, giving to the arbitrators all the necessary powers for hearing and deciding, without the interference or controul of the Court. They are constituted the sole judges of the competency and effect of evidence, and of every question of law or fact arising in the cause; and so far from their award being subject to the approbation of the court, it is to have the effect of a judgment from the time it is entered on the docket of the prothonotary, and to be a lien on the real estate of the party against whom it is made, until reversed on an appeal. The appeal seems to have been the only remedy immediately contemplated by the legislature. Nevertheless, as the award was to have the effect of a judgment, it has been decided that a writ of error would lie on it, in consequence of which it might be reversed for errors appearing on the face of the proceedings. Some things there are, however, which the law requires to be done, before the jurisdiction of the arbitrators attaches, and these things the Court may enquire into. The law prescribes the mode for entering the rule for arbitration and appointing the arbitrators, and certain other things to be done by the arbitrators before they proceed in the cause; these things may be enquired of by the Court in which the action was depending at the time the rule was entered, because, where the jurisdiction is never vested in the arbitrators, the proceedings are void, and the jurisdiction of the Court is not taken away.

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But when once the jurisdiction of the arbitrators has completely attached, the cause is out of Court, nor can the Court afterwards make enquiry into the proceedings before the arbitrators. When the award is returned and entered, it is considered as a record of the Court, and execution may be sued out upon it. Should it appear on the face of the award, that the arbitrators had exceeded their jurisdiction, or that the award was contrary to law, it would be subject to reversal on a writ of error if the suit was depending in an inferior Court, and if depending in *this Court*, we might set it aside because no writ of error lies from this Court. Whether an inferior Court might set an award aside in such case, is not now the question. But in whatever Court the suit was depending, there is no remedy but by appeal, for matters not appearing on the record which took place in the proceedings before the arbitrators during the time in which the cause was out of Court, viz. from the time when the jurisdiction became vested in the arbitrators, to the time when the award was entered in the prothonotary's docket. It is the opinion of the Court, therefore, that it is improper to hear the evidence offered by the plaintiff, because, if the fact were proved, it would not be relevant. The rule to shew cause why the award should not be set aside, must be discharged.

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Rule discharged.

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### The Commonwealth against BAIRD.

Monday,  
July 13.

THE following indictment was removed into this Court by *certiorari* from the Mayor's Court of the city of *Philadelphia*.

*" City of Philadelphia, ss.*

*October Session, 1817.*

" The grand jury of the Commonwealth of *Pennsylvania*, inquiring for the city of *Philadelphia*, upon their oaths and affirmations respectively, do present, that *James Baird*, late of the city aforesaid, yeoman, on the first day of *October*, in the year of our Lord one thousand eight hundred and seventeen, and at divers other days and times, as well before

What constitutes a good form of indictment for selling spirituous liquors without license.

A taxable inhabitant of the city is a competent witness on the trial of such an indictment; but one who has been actually taxed is not competent.

1818. as afterwards at the city aforesaid, and within the jurisdiction of this Court, with force and arms, did keep a tippling house without any license so to do, first had and obtained, according to law, and then and there without such license, commonly and publicly *did sell and utter, and cause to be sold and uttered* to sundry persons, divers quantities of rum, brandy, and whiskey and other spiritous liquors, *by less measure than one pint*, contrary to the form of the act of assembly in such case made and provided, and against the peace and dignity of the Commonwealth of *Pennsylvania*.”

*Philadelphia.*

The Commonwealth  
v.

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It was tried at *Nisi Prius*, on the 10th *April*, 1818, before GIBSON J. who reserved the point, whether *John Antrim*, a taxable inhabitant of *Philadelphia*, but not actually taxed, was a competent witness for the Commonwealth.

The cause now came on for argument on the point reserved, and also on the following reasons in arrest of judgment.

1. The indictment charges the defendant with keeping a tippling house, but the act of assembly on which it is founded, (act of 25th *March*, 1817,)(a) does not mention any such offence.

2. The offence is not laid to have been committed on any particular day, but on divers days, as well before as after the first day of *August*, 1817.

3. The indictment lays the offence to have been committed in the city of *Philadelphia*, and not in the city and county according to the words of the act of assembly.

4. The indictment charges the defendant with selling and uttering liquor; whereas the act speaks of selling and *delivering* liquor.

5. The indictment charges the defendant with selling divers quantities of liquor by less measure than one pint, whereas it ought to have followed the words of the act, and stated the offence to have consisted in selling and retailing less than one pint, delivered at one time and to one person.

6. The offence is not indictable. The remedy is by a *qui tam* action for the penalty, to be recovered with costs of suit.

(a) *Purd. Dig.* 415.

*C. J. Ingersoll*, who argued the case on behalf of the defendant, cited *Phill. Ev.* 93. Act of 3d April, 1794.(a) *Philadelphia*. 1818.  
 1 *Chitty on Crim. Law*, 275. 281. 286. Act of 19th March, 1783.(b) 1 *Chitty on Crim. Law*, 217, 218. 231. *Idem*, 177. The Commonwealth v. BARRD.  
 194. *The Commonwealth v. Searle*.(c) *Hawk. b. 2. ch. 25.*  
 sect. 4.

*P. A. Browne*, for the Commonwealth, cited *Phill. Ev.* 91.  
 34. 36. *Windham v. Chetwynd*.(d) *Jacob's Law Dict. Poor.*  
 Acts of 1706. 1710. 1721. 1783.(e) *Falls et al. v. Belknap*.(f)  
*Corwein v. Hames*.(g) *Overseers of Flushing v. Overseers*  
*of Jamaica*.(h) *Meade v. Robinson*.(i) 1 *Chitty on Crim.*  
*Law*, 238. 218. *The Commonwealth v. Sharpless*.(j)

The opinion of the Court was delivered by

DUNCAN J. This was an indictment in the Mayor's Court, for keeping a tippling house, in the city of *Philadelphia*, removed by *certiorari* into this Court, and is in these words. (His honour here read the indictment.)

On the trial, a taxable inhabitant was received as a witness, and the point as to his competency, reserved for the opinion of the Court. The defendant has likewise moved, to arrest the judgment, for the following reasons. The indictment is founded on the act of 25th March, 1817. (Here Judge DUNCAN referred to the act, and stated the reasons which had been filed.)

The motion in arrest of judgment, will be first disposed of, in doing which, it will be proper to consider the various legislative provisions on this subject. The act of 1710, 1 Sm. L. 73, provides, that no person, without license from the justices, shall keep a public house of entertainment, tippling house, or dram shop, under the penalty of five pounds; one half thereof to the Governor, and the other half to the use of the poor, of the city or township where the offence shall have been committed. By a supplement to this act, passed 26th August, 1721, 1 Sm. L. 127, it is enacted, that no person, not qualified as by the above recited act, shall presume to sell or barter with, or deliver any wine, rum, &c. which

(a) 5 Sm. L. 126.

(b) 2 Sm. L. 65.

(c) 2 Sm. 339.

(d) 1 Burr. 422.

(e) *Purd. Dig.* 411, 412, 414.

(f) 1 Johns. 486.

(g) 11 Johns. 76.

(h) 12 Johns. 285.

(i) *Willes*, 423.

(j) 2 *Serg. & Rawle*, 91.

1818. shall be used, or drank in their houses, yards or sheds, or  
*Philadelphia.* shall be so used or drank, in any shelter, place or wood, near  
 The Com- or adjacent to them, with their privity or consent, by any  
 monwealth companies of negroes, servants, or others, or retail or sell to  
 v. any person or persons, whatsoever, any rum, brandy, or other  
 BAIRD. spirits, by less quantity or measure than one quart, nor any  
 wine, by any less measure or quantity than one gallon, nor  
 any beer, ale, or cyder, by any less quantity than two gallons,  
 and the same liquors respectively delivered to one person,  
 and at one time, under the same penalty, as is prescribed by  
 the act of 1710. By the act of 19th March, 1783, 3 Sm. L.  
 65, it is provided, that if any person or persons, shall here-  
 after retail and sell, less than one quart of rum, wine, brandy,  
 or other spirits, to be delivered at one time to one person,  
 without having first obtained a license agreeably to law, for  
 that purpose, he or they shall forfeit and pay, for every such  
 offence, the penalty of ten pounds.

The most solid objection to this indictment, is the omis-  
 sion to state, that the liquor was delivered at one time, and  
 to one person, and I own, that if this were *res integra*, it  
 would be difficult to answer. But it will be observed, that  
 the same words are used in the act of 1721, "and the same  
 liquors, respectively delivered to one person, and at one  
 time." And in the act of 1783, "shall sell or retail, less  
 than one quart, and to be delivered at one time, and to one  
 person." The only alteration in the act of 1817, is, that in  
 the city and county of *Philadelphia*, the offence is to consist  
 of selling less than one pint, instead of one quart, the pe-  
 nalty is increased, and in the distribution of the penalty.  
 Keeping a tipling house is still an offence. Keeping a  
 tipling house in the city and county of *Philadelphia*, the  
 overt act being the retailing of liquor, by less measure  
 than one pint, is punishable under this statute. This form  
 of indictment having prevailed for eighty years; been adopt-  
 ed by successive attorney generals; the provisions of the se-  
 veral acts being nearly if not altogether in the same words, the  
 Court will not say, that all the prosecutions during that long  
 period of time are erroneous; for it is admitted, that this  
 has been the only form. A continued and cotemporaneous  
 practice, under a statute, in a matter merely formal, ought  
 not lightly to be disturbed. The Court have less difficulty  
 in deciding the remaining points. The only remedy is by

indictment. The keeping a tippling house is an indictable offence. The general prohibition, under penalty, to sell liquors by less measure than one quart, would, it is admitted, render the act indictable, unless some particular mode of recovering the penalty is prescribed, and the remedy by action, is inferred from the use of the words *costs of suit*, in the 2d section. This appears a forced inference, not warranted by a just construction of the whole act; for how in a *qui tam* action, could the Court sentence the offender, if convicted to pay the penalty or to the penitentiary house, to be kept at hard labour? As to the offence being laid in the city, if it could not be so laid, it would follow, that where the retailing was in the county, it would be exempted from punishment; for though the city might be in the county, the county could not be in the city. The city and county are to be construed disjunctively. Such is the manifest declaration of the legislature; for in the distribution of the penalty, one half is to enure to the guardians of the poor of the township or district where the offence shall occur. Any other construction would render the act insensible and void; nor is there any such inflexible rule in the construction of penal statutes, that you must abide by the very letter; for in the construction of penal statutes, the strict meaning of the expressions has been departed from, in order to comply with the manifest spirit and intention of the law. 1 *Binn.* 277. Nor does regard to criminals require such construction of words, perhaps not absolutely clear, as would tend to destroy and evade the very intention and meaning of the act. It is not unfrequent in the construction of statutes, to take the disjunctive as a copulative, and the copulative as a disjunctive, in order to make the words stand with reason, and the intent of the framers of the law. *Plow.* 296, 6 *Cranch*, 7. They are so to be considered here. An act declaring that a particular act, committed in the counties of *Philadelphia* and *Bucks*, should be punished in a certain manner, necessarily means in either county, for it could not be committed in both; it describes a certain district, consisting of two counties; if not so considered, the offence never could be committed; it could not be committed in both counties.

Having thus disposed of the reasons in arrest of judgment, the Court proceed to consider, whether on an indictment founded on this act, a taxable inhabitant is a competent wit-

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1818. *Philadelphia.* The Commonwealth v. BAIRD. ness. It is not stated, that the witness was actually assessed or rated. If this had been so stated, another question would have been presented to their consideration, than the one reserved; one admitting of little difficulty; one on which the Court could entertain no doubt, that such immediate, direct, and certain interest would exclude. It would require legislative provision to make such rated inhabitant a competent witness. Interest in the question never can influence the question of competency. The only inquiry is, Is he interested in the decision? The interest in the case must be fixed and certain, not dubious and contingent. By the act of 3d April, 1794, all inhabitants are made competent witnesses, respecting the settlements of the poor. 3 *Smith's Laws*, 126. And by the act of 2d February, 1808, 4 *Smith's Laws*, 492, in all actions brought by directors of the poor of the county of *Dauphin* for the recovery of any gift, grant, fine, forfeiture, &c. every person resident in the county is declared to be competent to hear, try, and give testimony touching the matters in controversy. Whether this would extend to fines on individuals where part of the penalty goes to the directors of the poor, it is not necessary to decide. It seems by the words, to extend only to actions commenced by the directors of the poor; this act, however, is local, and confined to the county of *Dauphin*. In a case where the exclusion of a witness would deprive the state of all means of conviction, would exclude the only evidence the nature of the case would generally admit of, further than decided cases have gone, I would not be disposed to extend the disqualification. The liability to assessment has not been deemed such an interest as would disqualify; the witness was not rated when he gave the testimony; he might never be rated; he might cease to be an inhabitant, or become exempt from taxation. It is too remote a possibility; a contingency altogether so uncertain, that he cannot be said to have an immediate and direct interest in the question, or in the fund arising from the distribution of the penalty. The witness was properly received.

Judgment for the Commonwealth.

1818.

Philadelphia.

CRAMMOND and another, surviving executors of KAY,  
surviving partner of CLOW *against* The Trustees of  
the late Bank of the United States.

Saturday,  
July 18.

IN this case the following was delivered as the opinion  
of the Court, by

TILGHMAN C. J. The plaintiff in this case, having obtained judgment against the defendant in the attachment, has issued a *scire facias* against the garnishee, returnable to the next term. The plaintiff's attorney now moves for an order, that the garnishee shall, at some day prior to the return of the *scire facias*, answer interrogatories filed under a supplement to the attachment act, passed 28th September, 1789, 2 Sm. L. 502. Although the attachment is always served on the garnishee, yet before any judgment can be entered, to affect him, it has been the uniform practice to issue a *scire facias* against him. This *scire facias* is not expressly given by any act of assembly, but is probably derived from the custom of London, which we have followed in our proceedings in foreign attachments. The garnishee then, being called on to appear on a certain day mentioned in the *scire facias*, it appears to the Court improper that he should be ordered to answer interrogatories before that day. The interrogatories may be sent out and served with the *scire facias*, and then if the garnishee makes any delay in answering them after the return of the writ, the Court will make such further order as will expedite the plaintiff's recovery. This we understand to have been the practice, and we see no cause for departing from it.

The Court will not order the garnishee in a foreign attachment to answer interrogatories filed under the act of 28th September, 1789, before the return of the *scire facias* against him. The interrogatories may be served with the *scire facias*, and if the garnishee makes any delay in answering them after the return of the writ, the Court will make such order as will accelerate the plaintiff's recovery.

END OF MARCH TERM, EASTERN DISTRICT, 1818.



# CASES

IN THE

## SUPREME COURT

OF

### PENNSYLVANIA.

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LANCASTER DISTRICT, MAY TERM, 1818.

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1818.

Lancaster.

The Commonwealth *against* HAMBRIGHT.

Tuesday,  
May 19.

IT appeared on the return of a *habeas corpus*, by which *Amos Harmer* was brought before the Court by the defendant, the jailor of *Lancaster* county, that he had been taken on a *capias ad satisfaciendum*, returnable, to *April*, 1818, in the Common Pleas of *Lancaster* county, issued in a suit by *William M<sup>c</sup>Kim*, assignee of *John Pettit*, against him and several other defendants, which the Court, on motion and after argument, set aside, being of opinion, that there was no judgment against him, and that, therefore, the writ was void. About an hour after the order for his discharge, he was arrested at the suit of the same plaintiff under a *capias ad respondendum*, issued against him and one of the other defendants in the former suit, returnable to *August* Term, 1818. By virtue of this writ he was imprisoned, and the Court of Common Pleas refused a rule to shew cause why he should not be discharged.

When another Court has refused to discharge one of its own suitors from arrest on the ground of privilege, this Court will not relieve on *habeas corpus*.

*Porter* and *Hopkins*, in his behalf, now moved for his discharge, on the ground, that it was a breach of privilege to arrest him, while he was attending the Court of Common Pleas, in order to obtain his discharge from the *capias ad*



# CASES

IN THE

## SUPREME COURT

OF

### PENNSYLVANIA.

LANCASTER DISTRICT, MAY TERM, 1818.

The Commonwealth against HAMBRIGHT.

1818.  
Lancaster.

Tuesday,  
May 19.

IT appeared on the return of a *habeas corpus*, by which *Amos Harmer* was brought before the Court by the defendant, the jailor of Lancaster county, that he had been taken on a *capias ad satisfaciendum*, returnable to April, 1818, in the Common Pleas of Lancaster county, issued in a suit by *William M. Kim*, assignee of *John Pettit*, against him and several other defendants, which the Court, on motion and after argument, set aside, being of opinion, that there was no judgment against him, and that, therefore, the writ was void. About an hour after the order for his discharge, he was arrested at the suit of the same plaintiff under a *capias ad respondendum*, issued against him and one of the other defendants in the former suit, returnable to August Term, 1818. By virtue of this writ he was imprisoned, and the Court of Common Pleas refused a rule to shew cause why he should not be discharged.

*Porter and Hopkins*, in his behalf, now moved for his discharge, on the ground, that it was a breach of privilege to arrest him, while he was attending the Court of Common Pleas, in order to be discharged from the *capias* ad

When another Court has refused to discharge one of its own suitors from arrest on the ground of privilege, this Court will not relieve on *habeas corpus*.

1818. *satisfaciendum*, for which they cited, 3 *Bac. Ab.* 425. *Hab. Lancaster* *Cor. B. Vaugh.* 153. *Salk.* 350.

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monwealth  
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HAMBRIGHT.

*Buchanan*, for the defendant, opposed the motion, arguing, that the privilege by which suitors were protected, was the privilege of the Court, and not of the party, and that it was entirely in their discretion, whether to allow it or not. *Cameron v. Lightfoot.*(a) *Street's Case.*(b) It was the province of the Court of Common Pleas to protect their own suitors, and they had thought proper to refuse the privilege claimed on this occasion. If this Court may, upon a *habeas corpus*, discharge a man arrested under the process of another Court, on such ground, every Court and every Judge of the Common Pleas, may discharge persons arrested on writs issued by this Court.

But this, he contended, was not a case of privilege. The discharge from arrest under the *capias ad satisfaciendum* did not discharge him from arrests for other causes, and no adjudged case could be found, in which privilege was allowed under such circumstances.

By THE COURT. The Court of Common Pleas having decided, that the prisoner was not entitled to privilege from arrest, we are of opinion, that this Court ought not to interfere, and therefore the prisoner is to be remanded.

Prisoner remanded.

(a) 2 *Bl. Rep.* 1190.

(b) 1 *Dall.* 356.

1818.

SEIDENBENDER and another *against* CHARLES's administrators.

Lancaster.4sr 151  
196 4234 SR 151  
27 SC '1858

IN ERROR.

Wednesday,  
May 20.

IN the Court of Common Pleas of *Lancaster* county, from which this case was brought, by writ of error, a statement of the facts, upon which the merits of the controversy rested, was agreed upon by the administrators of *Joseph Charles*, who were plaintiffs below, and the defendants, to be considered as a special verdict, and judgment, without pre-judice to either party, was to be entered upon it, against *Christian Stoner*, one of the defendants, *Christian Seidenbender*, the other, having gone off. The object was to obtain a speedy decision by the Supreme Court, upon the validity of the contract on which the suit was brought.

An action founded upon a transaction prohibited by a statute, cannot be maintained, although a penalty be imposed for violating the law, and it be not expressly declared, that the contract is void.

A lottery for the disposal of land, is within the prohibition of the act of 17th February, 1762, and no action can be sustained for the price of a ticket.

The following is the substance of the statement.

*Joseph Charles*, the intestate, being in his life-time, seised in fee simple, of a tract of land, in *Lancaster* county, known by the name of the *Blue Rock* farm, which he had purchased for 1,000 dollars an acre, advertised, that he had laid out a town upon it, called the town of *Blue Rock*, on the eastern side of the *Susquehannah* river, consisting of two hundred lots, of from fifty-two to fifty-five feet front, and one hundred and thirty feet deep, laid off in sixty-four squares, producing one hundred and twenty-eight corner lots, all fronting on streets sixty feet wide, and extending to fourteen feet wide alleys. The advertisement then set forth, a number of advantages of situation, soil, &c. possessed by the site of the intended town, and proceeded to state, that lot No. 24, was entitled to an elegant new two story dwelling house, worth 11,000 dollars; No. 25, to an ice house; No. 28, to a large new barn, and stabling, estimated at 3,000 dollars; No. 15, to a log stable; No. 16, to a log dwelling house; all in good repair, and that No. 7 and 8, would be granted to lot holders, for public use; the whole of which he offered for sale, in the following manner. Each purchaser was to re-



1818. *Lancaster.* ceive a certificate, entitling him to such lot as might be drawn against its number, on receiving which, he was to give his notes with approved security, for the payment of three hundred and thirty dollars; one hundred and thirty to be paid, when a deed in fee simple, at the expense of the purchaser, should be duly executed and tendered for such lot, as might be drawn to his number; one hundred on the 1st *March*, 1815, and the remaining one hundred, on the 1st *March*, 1816, without interest. Immediately after the certificates were sold, the lots were to be drawn for, by numbers, under the direction of the purchasers, of which public notice was to be given.

SEIDEN-  
BENDER  
and another  
v.  
CHARLES'S  
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tors.

*Seidenbender* and *Stoner* purchased certificate, No. 102, by which they, their heirs and assigns, were to be entitled to a deed in fee simple, for such lot as might be drawn against that number, according to the plan, for disposing of and determining the ownership of lots, laid out on the eastern bank of the *Susquehannah* river, &c. which was signed by *Joseph Charles*. On receiving this certificate, they delivered to *Charles*, their notes, according to the terms above mentioned. That, upon which, the present suit was brought, was in these words :

“ Note § 130. On the delivery of a deed in fee simple, (at my expense,) for such lot as may be drawn against certificate, No. 102, purchased by us, in the town of *Blue Rock*, on the eastern bank of the *Susquehannah* river, we promise to pay unto *Joseph Charles*, his heirs or assigns, without defalcation, one hundred and thirty dollars, for value received.

Signed, { “ *Christian Seidenbender*.  
“ *Christian Stoner*.”

A deed, duly executed and acknowledged, by *Charles* and his wife, conveying to *Seidenbender* and *Stoner*, in fee simple, the lot drawn to their number, was delivered to, accepted, and recorded by them ; and whether upon these facts, the plaintiffs were entitled to recover, was the question presented for the Court's decision.

The case was argued at an adjourned Session of this Court, on the 11th *October*, 1817.

*Montgomery and Buchanan*, for the plaintiffs in error.

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The single question is, whether the plan adopted by *Joseph Charles*, for the disposal of the lots in the town of *Blue Rock*, was a lottery prohibited, within the meaning of the several acts of assembly, regulating lotteries; for if it were, although a penalty is imposed on those who contravene the law, no contract founded on such illegal transaction, can be carried into effect. Where a contract is against the principles of the common law, against the provisions or the spirit and policy of a statute, against justice, or against morals, no action in affirmance of such contract, can be supported; nor will the infliction of a penalty by a statute, give life to a contract founded upon the forbidden transaction. The truth of this position is proved by a multitude of authorities, as well as founded upon a just and true policy. *Powell on Cont.* 176. 1 *Bulst.* 38. *Mead v. Bygott.*(a) *Com. on Cont.* 30. 1 *Fonb. b.* 1. c. 4. *Earl v. Peale.*(b) *Bull. N. P.* 146. *Coulon v. Maybin.*(c) *Mitchell v. Smith.*(d) *Biddis v. James.*(e)

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At an early period, our legislature appears to have been impressed with a sense of the pernicious consequences of gaming by lotteries, and to have been studious to prevent their progress. In the year 1729, an act of assembly was passed, inflicting a penalty of one hundred pounds, upon any person, who should set up a lottery within the province, which was repealed by an act, passed on the 17th *February*, 1762,(f) the preamble of which declared, that mischievous and unlawful games, called lotteries, tending to the corruption of youth, and the ruin and impoverishment of many poor families, had been set up in the province, and that such pernicious practices, not only gave opportunities to evil disposed persons, to cheat and defraud the honest inhabitants of this province, but proved introductive of vice, idleness, and immorality, injurious to trade, commerce, and industry, and against the common good, welfare, and peace of the province, and pronounced all lotteries whatsoever, whether public or private, to be common and public nuisances, and against the common good and welfare of the province; and imposed a penalty of five hundred pounds, upon

(a) *Cro Eliz.* 230.(b) 10 *Mod.* 67.(c) 4 *Feates*, 24.(d) 1 *Binn.* 110. 117.(e) 6 *Binn.* 321. 329.(f) 1 *Sm. L.* 246.

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every person who should set up or erect, any such lottery, play, or device, to be played at, drawn at, or thrown at, or should procure the same to be done, by dice, lots, cards, balls, tickets, or any other numbers or figures, or in any other manner whatsoever. In the same spirit, a penalty not exceeding one hundred dollars, is imposed by the act of 2d March, 1805, (a) upon every person who should offend against the provisions of that law, which was made for the more effectual prevention of excessive and deceitful gaming, to prevent unlawful sales of chances of lottery tickets, and to prevent insuring for or against the drawing of such tickets; and by the act of 2d April, 1811, (b) a penalty, not exceeding two thousand dollars, is inflicted on any person, who shall sell, advertise, or expose to sale, any ticket, in any lottery, not authorised by the laws of this Commonwealth, or be in any manner concerned in the sale of such ticket, or in the management of such lotteries, which penalty is appropriated to the use of the *Union Canal Company*. That the lottery in question, is within the words of the act of 1762, is not denied, nor does it admit of a doubt, that it is within its spirit. Its language is as comprehensive as possible, and embraces all lotteries whatsoever. Whether land lotteries existed prior to this act of assembly or not, is immaterial. The object of the legislature, was to prevent the establishment of all lotteries, which were calculated to injure the morals of the people, and to introduce those mischiefs which were recited in the preamble. Although, therefore, they might then have had, in their immediate view, only such as at that time existed, it can hardly be supposed, that they did not intend to extend the prohibition to all lotteries, whatever might be the subject of them, whose consequences were of the same injurious character. The tendency of lotteries of this description, it is scarcely necessary to point out. They are perhaps, more pernicious in the train of evils which follow them, than money lotteries, because, in addition to the spirit of gaming, which they equally with others, inculcate, the loss to the adventurer is greater, and it is notorious, that many poor young labouring men, have been ruined, in consequence of having embarked in these town-lot lotteries.

The law as laid down in 1 *Show.* 491, that the words of a statute are not to be enlarged, so as to comprehend what

(a) 4 *Sm. L.* 210.

(b) *Purd. Dig.* 244.

was not meant to be included, is agreed. The true rule, however, on this subject, is to be found in the case of *Bole v. Lancaster*. 1818.

*Horton*, (a) that where the words of a law do not extend to an inconvenience seldom occurring, and do to those which happen frequently, they are not to be strained beyond their proper limits ; but if the words comprehend an inconvenience which seldom occurs, there is no reason why they should not and be extended to it, because does not happen frequently. The rules for the construction of statutes, are also stated in 6 *Bac. Ab.* 389. 3 *Rep.* 7. 1 *Rep.* 123. 11 *Rep.* 71. *Cro. Car.* 553. 6 *Bac. Ab.* 380. *Plowd.* 369. 3 *Atk.* 204. *Cowp.* 543. 1 *Bl. Com.* 87. The words of the act of 1762, confessedly embrace the lottery in question, and it is evidently within the mischief intended to be cured. There is no reason, therefore, why it should not be comprehended within the prohibition of the law, because this particular species of lottery did not exist, when the law was passed. This act of assembly is almost a transcript of the statute 10 & 11 *Wm.* 3. c. 17, which certainly comprehended lotteries of this description, for the statute 8 *Geo.* 1. c. 2, inflicts a penalty of five hundred pounds, upon persons who keep offices for the sale of land by lottery, *over and above* the penalties imposed by former statutes; which plainly shews, that the statute of *William III.* was understood to extend to such lotteries, though insufficient to restrain them.

It is argued that the proprietaries themselves disposed of their land by lotteries the legality of which has never been questioned. Such an one as that which was attempted in the year 1735 could not have been made after 1762, and that which was made in 1769 had not the features of a lottery properly speaking. The price of all land was the same, but where two or more applied for the same land it was determined by lot who should have it. Nothing was paid to the proprietaries for a ticket but merely seven shillings as a fee to the officers for entering the application. The present lottery is of a very different character. Every thing was to be determined by chance, and the profit of the lottery owner was immense. He purchased the land for 1000 dollars per acre, and sold each lot, six of which at least were contained in an acre, for 330 dollars, making 1980 dollars an acre. The lots were of extremely unequal values ; one or two were worth large sums of money, and the great majority

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(a) *Vaugh.* 373.

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worth comparatively very little. Who were to be the fortunate possessors of the prizes was to be determined by chance alone; and thus the ignorant, deluded with the hope of obtaining a valuable house and lot, ran a great risk of losing nearly their whole stake.

There is no analogy whatever between such a distribution of property and a partition between tenants in common, who must be seised, each of a certain, though undivided portion of the land, before the division takes place. But here no conveyance was to be made until after the lottery had been drawn. The certificate entitled the holder to the lot which might *be drawn against its number*. There was no vested ascertained right before the drawing, but the right of each was dependent on a contingency, and as soon as it did vest it was not to a certain undivided portion of the whole, but to a particular lot distinctly designated in the plot. It possessed every feature of a lottery, was productive of the pernicious consequences intended to be guarded against, and was therefore within the provisions of our acts of assembly.

*Rogers and Hopkins*, for the defendants in error. *Ex turpi contractu non oritur actio*, is a maxim which it is not intended to dispute; but in the contract on which this suit is founded, there is nothing which violates justice, morals, the principles of the common law, or any act of assembly. The scheme resorted to by *Charles* for the sale of his land, was conformable to a practice which has long prevailed, and to an uniform understanding that it was not forbidden by the act of 1762. He purchased the land, and offered it for sale in lots, the purchasers to hold as tenants in common, the terms being fixed by which each should have his part separately assigned to him. If the holders of certificates had purchased the whole tract, and divided it among themselves, it cannot be denied that such a division would have been legal; and this was in effect doing the same thing. Tenants in common may adopt what mode of partition they think proper, and are not obliged to divide the whole in equal parts. On the purchase of a certificate, each holder had a vested interest in some part of the land, though in what part was to be determined by the drawing of lots. Nothing is more common, and nothing can be more fair and equitable than such a mode of dividing land, for which we have the sanc-

tion of even sacred authority. It was in this manner that the promised land was divided among the Israelites. *Numbers*, ch. 26, v. 54, 55, 56. ch. 33, v. 54. *Littleton* (sect. 246,) says parceners may divide by lot, and *Blackstone* (2 *Bl. Com.* 189,) mentions this as one of the modes of division among parceners. In *Jackson v. Witter*,<sup>(a)</sup> the tract in which the land in controversy lay was divided by lot; so in the cases of *Jackson v. Vedder*,<sup>(b)</sup> *Jackson v. Hunter*,<sup>(c)</sup> *Jackson v. Session*,<sup>(d)</sup> and *Jenks v. Backhouse*.<sup>(e)</sup> And by the "conditions and concessions" entered into by *William Penn*, with the first purchasers on the 11th July, 1681, (*Gall. Laws*, 8,) each purchaser was to have a city lot in proportion to his purchase in the country, and this was to be assigned by lot.

Lotteries were not forbidden by the common law. The most careful examination of the books will not produce a single case in which they have been declared illegal; on the contrary, reasoning from the obvious analogy between them and wagers, they appear to have been considered lawful. Wagers, except in particular cases, are lawful, and may be recovered; 3 *Schw. N. P.* 1188, where many cases are cited in proof of this position. Wager policies were good at common law, but prohibited by statute 19 *Geo. II.* Lotteries therefore being prohibited only by statutes, in which heavy penalties are imposed upon those concerned in them, these statutes must be strictly construed. In giving a construction to the act of 1762, the mischief which then prevailed, and the remedy intended to be administered are to be considered, as these are the true and only lights by which the intention of the legislature can be explored. Mischiefs which have subsequently arisen are not to be taken into view, because they could not have been contemplated by the framers of the act. The words too must be taken in their common received acceptation, and are not to be carried so far as to overthrow what the legislature did not intend to meddle with. *King v. Bishop of Lond.*,<sup>(f)</sup> *Simon v. Metivier*.<sup>(g)</sup> *Stradling v. Morgan*.<sup>(h)</sup> The act of 1762 was not intended to apply sales of land. The preamble declares that lotteries tended to the corruption of youth and the ruin of poor families; and

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(a) 2 *Johns. Rep.* 180.(b) 3 *Johns. Rep.* 8.(c) 1 *Johns. Rep.* 497.(d) 2 *Johns. Cas.* 321.(e) 1 *Binn.* 91.(f) 1 *Show.* 491.(g) 1 *Bl. Rep.* 599.(h) *Flewd.* 205.

1818. *the law was passed with a view to such lotteries as this description of people were in the habit of being ensnared by.*  
*Land lottery existed prior to 1762, except that established by the proprietaries in 1735. It is impossible therefore that such lotteries could encourage vice and immorality in 1762, and impossible that the legislature could intend to prohibit them. Besides, the young and the poor, whose morals were particularly to be guarded, never embark in a lottery for land in which the price of tickets is always too high to be within their reach. It is a mode of selling land highly useful, because it distributes it among individuals in small quantities, and was accordingly attempted to be introduced by the proprietaries themselves in the year 1735, 2 Sm. L. 149, note; though as the lottery never filled, it was not drawn. This was a short time after the arrival of Thomas Penn, and shews his construction of the act of 1729, prohibiting lotteries. On the opening of the land office too on 3d April, 1769, another proprietary lottery was established for the disposal of land, and the legality of neither of these lotteries has ever been questioned. 2 Sm. L. 169. 180, note. Our act of 1762 very much resembles the British statute of 10 and 11 William III. c. 17. In both, lotteries are declared in general terms to be common nuisances, and in both the enacting clauses are very much alike. No adjudged cases are to be traced on this statute, but it was found necessary to pass the statute 8 Geo. I. c. 2. against the sale of lands by lottery, which affords an inference that the statute of William did not reach them. Both these British statutes, the first relating to personal property, the last to land, were in existence when the act of 1762 passed. They were both before the eyes of the legislature, and they followed that relating to personal property only. It cannot be supposed that if they intended to embrace land lotteries, they would not have said so, when the statute of 8 Geo. I. was directly within their view.*

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But this does not properly fall under the denomination of a lottery; there were no blanks; every certificate holder was entitled to some land for his money; it was therefore deficient in one of the peculiar and essential characteristics of a lottery. It is a mode of disposing of land which has been recently much resorted to in this and other counties, and under which a great number of very large estates are held. To pronounce it now to be illegal, and that all contracts

founded upon such transactions are void, will shake many valuable titles, and introduce a multitude of evils.

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The Judges this day delivered their opinions *seriatim*.

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TILGHMAN C. J. This is an action brought on a promissory note given by *Seidenbender* and *Stoner* to *Joseph Charles* deceased, for one hundred and thirty dollars, to be paid, "on the delivery of a deed in fee simple to the drawers of the note, for such lot of land as shall be drawn against certificate No. 102, purchased by them in the town of *Blue Rock*, on the eastern bank of the *Susquehanna* river." The defendants contend, that they are not bound to pay this note, because it was given on an illegal consideration, to wit, on the purchase of a ticket in a lottery made by *Joseph Charles* deceased, for the sale of a tract of land called the *Blue Rock Tract*. By an act of assembly passed 17th February, 1762, lotteries are declared to be "public nuisances, and against the common good and welfare of this province." If the lottery under which this ticket was sold, be within the act of assembly, the consequence must be, that this action cannot be supported, because it would ill become a court of justice to lend its aid to a transaction declared by the legislature to be "against the common good and welfare of the state." It was formerly a question, whether an action would not lie in cases where a penalty was inflicted by statute, but the contract was not expressly declared to be void. But both in *England* and in this country, that question has been long at rest. It is unnecessary to cite English authorities, because the matter has been fully considered and decided, in our own Courts. In *Mitchell v. Smith*, 1 Binn. 110, it was determined, that there could be no recovery on a bond given for the consideration money of a tract of land in *Luzerne* county, sold by the obligee to the obligor, under a title derived under the state of *Connecticut*. The sale was against the interest, the policy, and the dignity of the Commonwealth of *Pennsylvania*, by setting up a title derived from another state, to land lying within the bounds of *Pennsylvania*. Such sales were forbidden by act of assembly; but there was no act by which this bond was declared to be void. About the same time, it was decided by this Court, in the case of *Maybin v. Coulon*, that an action could not be supported, on a con-



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tract which was connected with a breach of the laws of the *United States*, in covering a ship, the property of a foreigner, in the name of a citizen of the *United States*; and since that, in the case of *Biddis v. James*, 6 Binn. 321, it was held, that no action would lie, founded on a sale of a lottery ticket, and the same point was decided in *Primer v. M'Connell*. The same principle was adopted by the Supreme Court of *New York*, in the case of *Hunt v. Knickerbocker*, 5 Johns. 327. So that I consider it as perfectly settled, that an action cannot be sustained, founded on a transaction prohibited by statute, although it be not expressly declared that the contract is void.

The only question then is, whether the transaction in which this ticket, or certificate, was sold, is prohibited by an act of assembly? for the plaintiff contends, that it is merely a sale of a tract of land, for an adequate consideration, not forbidden by any law, nor in its consequences injurious to the common welfare. Let us consider, whether this be really the nature of the case. A man possessed of a tract of land on the banks of the *Susquehanna*, devises a scheme for selling it, at the rate of about 2000 dollars an acre. It will not be seriously contended, that the whole tract was, in truth, worth the whole sum to be produced by the lottery. In order, therefore, to induce people to become purchasers, they were to be allured by the prospect of gain. But this gain depended upon chance, which is the essence of a lottery. All tickets were sold for the same price; but the lots were of very unequal value. One, on which a dwelling house was erected, was valued at 11,000 dollars. Another, on which there was a barn, was valued at 3000 dollars. Two others had wooden buildings on them. There was a range of lots on the river, peculiarly valuable from their situation. But the great mass which lay back from the river, and had no buildings, bore no proportion to the price at which the tickets were sold. In what then, does this differ from a common lottery, except that in one case the holder of a ticket receives money, and in the other, land? If it be said, that in this case, there are no blanks; I answer, that no material difference arises from that circumstance. Some of the most fraudulent lotteries ever known, have been those in which there were no blanks. They are an imposition on the folly of mankind; for, of what importance is it, if a man, who pays a consider-

able sum for a ticket, has a prize of very little value., In the present instance, a ticket is sold for three hundred and thirty dollars, and the holder is not certain of receiving more than between one-sixth and one-seventh part of an acre. It is urged in its favour, that sales of this kind have been very common, and much property is held under such titles. I am not giving any opinion on cases, where the parties have thought proper to carry the contract into effect. The present question is, whether the purchaser of a ticket can be compelled to pay for it. If we decide that he cannot, it will put an end to a wide spreading mischief, without affecting the security of titles. The act of assembly declares, in express terms, that "all lotteries whatever, whether public or private, are common and public nuisances, and against the common good and welfare." Is not this a lottery? No, say the plaintiffs; it is no more than a *partition by lot*, of a tract of land, of which all the purchasers of tickets, were *tenants in common*. But this is directly contrary to the truth; for, until the lottery was drawn, no purchaser had any right to any part of the land; and when it was drawn, they took very unequal interests, designated by the chance of the wheel. When tenants in common make partition, they are seised of the whole estate before partition, and the object of the lots is, to assign to each his particular portion, the whole having been previously divided into parts as nearly as possible of equal value. The two cases are so extremely dissimilar, that the mind is struck with the difference, before it can frame an argument to prove it. Neither have the plaintiffs succeeded better in their comparison between *this* lottery, and that made by the proprietaries of *Pennsylvania* in *April*, 1769, when they opened their office for the sale of the land purchased of the Indians at the treaty at *Fort Stanwich*, in *November*, 1768. The proprietaries wished to place all purchasers on an equal footing. All the lands were offered at the same price per acre. But it was foreseen, that there might be several applicants for the same tract, and the only object of the lottery was, to decide by fair chance, who should have the preference in such cases. Every one who wished to purchase, put in an application describing the land. On the putting in of his application, he paid the proprietary officers a fee of seven shillings for their trouble, but not one farthing for the land. All applications were put in one wheel, and

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the priority of each was decided by a *number* drawn from another wheel. Those who did not get the tract they wanted, paid nothing; and even the fee to the officers was not thrown away; for it was the practice to permit the unfortunate applicants to take up vacant land in any other place, without paying new fees. It is not possible, therefore, for any two things to be more unlike, than the proprietary lottery and the lottery of *Joseph Charles*. Barely to state the circumstances of each, is sufficient to shew their difference. But it has been argued on the part of the plaintiff, that the act of 1762, was confined to lotteries concerning *personal property*; that land lotteries not being at that time in practice, no evil arising from them could have been in contemplation; and that this appears from the legislature's having adopted the expressions of the English statute of *Wm. III.* against lotteries of personal property, but neglected the statute of *Geo. I.* against land lotteries.

Upon the perusal of our act of assembly, we perceive an intent to cut up lotteries of every kind by the root; and for this purpose, it is enacted in the first section, in the most comprehensive terms, *that all lotteries whatever, whether public or private, are common and public nuisances, &c.* This was the wisest course that could be taken. For, it being impossible to foresee all the different schemes that ingenuity might devise, it would have been dangerous to enter into an enumeration of particulars. But having destroyed all lotteries by the sweeping expressions in the first section, the act proceeds in the second section to describe certain kinds of lotteries, in pretty general terms, for the purpose of inflicting a penalty on the offenders. In this section, which is evidently drawn after the English statute of 10 and 11 *Wm. III.* ch. 17, a penalty of 500 pounds is imposed on persons "who shall publicly or privately set up, erect, make, exercise, keep open, shew, or expose to be played at, drawn, or thrown at, any lottery, play, or device, or shall cause or procure the same to be done, either by dice, lots, cards, balls, tickets, or any other numbers, or figures, or in any other manner or way whatsoever." The lottery of *Joseph Charles* is within these words, for he did publicly *set up a lottery, to be drawn at, by numbers, or figures.* But even if the case were not embraced by the second section, it clearly is so by the first, which would be sufficient to prevent the plaintiff's recovery; for, the gene-

ral position in the first section, of *all lotteries being a nuisance*, 1818. &c. is not diminished, or impaired, by the second section, *Lancaster*. which imposes penalties in certain cases. As to the argument drawn from the statute 8 Geo. II. ch. 2. which our act has not copied, there is no force in it, for, although it is true that this statute expressly mentions lotteries for the sale of lands, &c. and that such lotteries are not expressly mentioned in the statute of Wm. III. yet it by no means follows, that these lotteries were not comprehended in the prohibition of the statute of Wm. III. Nay, the opinion of the British parliament seems to have been, that they were comprehended, because the statute of Geo. II. imposes penalties, "*over and above any former penalties inflicted by any former act or acts of parliament.*" Upon the whole, it appears, that the lottery of *Joseph Charles*, falls within the words of the act of 1762; it appears also, that it is within the intention of the act, because it tended to the impoverishment and ruin of many persons. I am, therefore, of opinion, that no court of justice should suffer an action for the price of a ticket, to be maintained, because that would be, in effect, giving aid to an illegal transaction. It follows, that the judgment of the Court of Common Pleas should be reversed.

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GIBSON J. Undoubtedly this is a lottery transaction. Property, either real or personal, may be divided by lot, without incurring any penalty imposed by the different acts of assembly, prohibiting unauthorised lotteries; but then there must be a previous existing interest in the thing thus divided. Here no interest vested till the lottery was drawn, and the same circumstance that vested it, at the same time attached it specifically and exclusively to the property acquired. For what purpose was this ticket purchased, but to acquire an interest in property? It is idle, therefore, to say the purchasers of tickets, were tenants in common, of the whole property intended to be thus disposed of, before the drawing commenced, and that the drawing was merely intended to separate the particular interests of each, and was merely a mode of partition. It is not only the drawing of a lottery that is prohibited; the purchase or sale of tickets with a view to such drawing, is equally so. But if the law had not prohibited the purchase of tickets, no interest would have vested by the purchase only, for the contract did not look to an interest in

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common; by its terms, the holder of a ticket, was to have such lot as should be drawn opposite to its number, and nothing else. Nor does the circumstance of the scheme being without blanks, vary the nature of the transaction. A great proportion of the prizes, when considered in relation to the price of the tickets, were nothing more than nominal. In this respect there can be no difference, between a lottery where the object is land, and one where it is money. If the absence of blanks were sufficient, it would be easy to evade every prohibition on the subject. The act of 1762, forbidding all lotteries public or private, was intended to protect the unwary from a spirit of gambling, regardless of the dictates of prudence, which the prospect of adventitious and inordinate gain, most usually excites. Would not the inducements to adventure be increased, by the deceptive consideration, that the price of the ticket would not be wholly lost? But it is said, that although this may have been a lottery, still it is not within the purview of the act of 1762. It clearly is within the letter of the enacting clause. I grant, the legislature may not have had this particular kind of lottery in view; but, was it intended to restrain the operation to those particular kinds of lotteries then in use, and to those only? I apprehend not. It is very clear, that a particular kind of mischief, differing not in form or substance, but in degree only, from the one under consideration, and only less pernicious in its consequences, first induced the legislature to act on the subject. Shall the letter, which is sufficiently comprehensive to embrace this case, be restrained to the particular mischief then existing, and exclude one of the very same stamp, merely because it was not then practised? This surely would not be a sound construction. The key of the construction of a statute, is the intention of the legislature; and I readily admit, that cases, seemingly within the letter, have been excluded, and, indeed, the act construed in direct opposition to the letter, to attain that intention, where it was clear beyond dispute. The intention may be collected by a consideration of the cause and mischief that led to the enactment of the law; by comparing one part of it with another, and judging from a view of the whole ground; and sometimes from extrinsic circumstances. What would the legislature have said, if the case of a lottery, such as the present, had been put to them? Surely not that they intended, by re-

citing in the preamble, the particular mischief that produced the law, to qualify and restrain the general and comprehensive expressions in the body of the act, and exclude cases, generically the same in their nature and consequences, merely because they happened not to be specifically enumerated, or were not then in existence. In *Bole v. Horton*, *Vaugh. Rep.* 373, it is laid down, that where the words of a law extend not to an inconvenience rarely happening, and do to those which often happen, it is good reason not to strain the words further than they reach; but it is no reason, if the words *do enough* extend to an inconvenience seldom happening, that they should be restrained, because it happened not more frequently. 19 *Vin. tit. Statutes, E. 6. pl.* 69, 70. This last is precisely in point. Nothing can be more extensive than the words of the act of assembly. All lotteries whatever, whether public or private, are declared common nuisances, and penalties are imposed on any person, who shall set up "any lottery, play, or device, by dice, lots, cards, balls, tickets, numbers, or figures, or in any other manner, or way whatsoever." Now, what was the mischief intended to be remedied? The preamble recites, that many mischievous and unlawful games, called lotteries, had been set up in the province, tending to the corruption of youth, and the ruin and impoverishment of poor families, and that such practices, not only gave opportunities to evil disposed persons, to cheat and defraud the honest inhabitants, but proved introductive of vice, idleness, and immorality, against the common good and welfare of the province. Have not all lotteries, whether on a great or small scale, whether the price of the tickets be high or low, directly and inevitably this tendency? This law was not made for the exclusive protection of minors and poor families; it was made to prevent the introduction of vice, idleness, and immorality, in whatever shape they might flow from this contaminating source. It is of no consideration, that the price of tickets was so high, in this instance, that all but people of wealth above mediocrity, were precluded from adventuring. We know from experience, that when a spirit of speculation, or desire of inordinate gain, infects the rich, it terminates in scenes of ruin and devastation, as wide spread, and deplorable in their consequences of misery and want, in the domestic relations of life, as if it had been confined to those who had

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1818. comparatively little to lose. Then, is not a lottery of this sort, within the mischief intended to be prevented; and if it also be within the letter, on what principle can we say the act does not extend to it? We are bound to extend it to every case within the letter, which we can suppose, would, if foreseen, have been specially provided for, and will any one say the legislature, if it had foreseen the existence of these land lotteries, would have excepted them from the operation of the general provisions of the act. The preamble will not always serve as a guide to the construction of the purview, much less control it. *Barker v. Reading*, 1 *Jones's Rep.* 163; *Palm.* 485; *The King v. Athos*, 8 *Mod.* 144. The true rule seems to be, that where the not restraining the generality of the enacting clause will be attended with an inconvenience or particular mischief, it shall be restrained by the preamble, otherwise not, *Ryall v. Rowles*, 1 *Vez.* 365. No inconvenience or mischief can arise by declaring this transaction unlawful. It is said that the lots of many towns in the state have been disposed of in this manner, and that the security of many titles would be disturbed if the legality of the original transaction should be called in question. But how a contract, executed by a conveyance, and not fraudulent as to third persons, could be impeached on this ground, I am at a loss to discover.

The construction of English statutes before our revolution, and in *pari materia* with our acts of assembly, although not conclusive, is yet entitled to great weight in doubtful cases under the latter. The 10 and 11 *Wm.* III. c. 17, is substantially the same as our act of 1729, the preamble of which is narrower than that of the act of 1762, now in force. The 8 *Geo.* I. c. 2. Sec. 36, was not founded on a supposition that sales of houses or lands by way of lottery were not within the purview of the 10 and 11. *Wm.* III. The preamble to that section declares that former prohibitions had been *evaded*, and the enacting clause increases the penalty, two-thirds of which is given to the informer to encourage prosecutions for this offence. The inference attempted by the counsel therefore fails. The preamble of the 10 and 11 *Wm.* III. states the grievance to be, that children and servants were defrauded; yet the purview, according to legislative interpretation, was not narrowed to exclude lotteries of the same character of that under consideration.

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To prove the cotemporaneous exposition of this act, the lottery for the sale of lands proposed by the proprietary in 1735, whilst the act of 1729 was in force, and the drawing for preference of location under the application system in 1769, are mentioned. The last was any thing but a lottery. The proprietary received nothing for tickets: the seven shillings paid on each, went to the officers of the land office to defray the expenses; and no interest vested on the drawing, but only on the issuing of the location, which the proprietary might have withheld if he had thought proper. It was to ascertain whose pretensions should yield, where there was more than one application to become the purchaser of a particular spot, that the decision by lot was had recourse to, and nothing else was decided by it. The scheme of 1735 was, however, strictly a lottery. But the proprietary was in that capacity a *quasi* sovereign, being the executive of the colonial government, and it is not very clear that an act of assembly would extend to him unless he were particularly named. Would the statute of limitations, (had it then existed,) have run against him? He had a right under the charter, to dispose of his land, which the legislature could not take away, and whether they could modify it is a matter not free from doubt; at all events these considerations might readily induce him to suppose, and the people to acquiesce in it, that he was, for personal reasons, exempted from the provisions of the act of 1729.

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I am also of opinion that the 27th section of the act of the 2d of April, 1811, to incorporate the Union Canal Company, comprehends this case. It prohibits the sale of all tickets in lotteries not authorised by law. The object of the legislature was to direct the spirit of speculation that existed toward the lottery which that company was authorised to make, to aid in the undertaking in which they were engaged, and to suppress every other lottery. This view would be defeated if projects of this sort, so flattering to the cupidity of adventurers, were permitted to be brought in competition by individuals. I therefore concur in opinion that the judgment be reversed.

**DUNCAN J.** An adjourned session of this Court was held in *October* last, principally for the purpose of deciding the general question respecting a species of lotteries, called land



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lotteries. It was represented as a question of importance to many of the inhabitants of *Lancaster* county; as property to a vast amount in that county had been disposed of in this way; and that all was stagnant until the ultimate decision in this Court. The case selected was one of the most favourable cast for the defendants in error, as the plaintiffs had drawn a valuable prize, accepted a conveyance, and now hold the title. A general view has been taken of all the acts on the subject of lotteries, and of the practice and usage since the passage of the acts of 1729 and 1762, in order to shew that the disposition of lands by lottery was not within the meaning of these acts.

Whatever may have been the extent of the provisions of former laws, the act of 17th *September*, 1762, 1 *Sm. L.* 246, embraces in terms all lotteries whatsoever. The mischief of lotteries, as stated in the preamble, has produced in a great degree the distress which now affects this county; they have produced the impoverishment of many poor families, and have reduced to want the families of many of the wealthy; and the corruption not only of the youth but of the aged; for the rich and the poor, the young and the advanced in life, have plunged into the vortex, with a delusion only exceeded by the South Sea and Mississippi schemes. No observing man but must pronounce, that they have produced the very evils foreseen by the legislature of 1762; that they have been promoters of vice, idleness, and immorality, and have been injurious to trade, commerce and industry; to meet and to prevent the evils foreseen by the legislature, and for remedy thereof, it was enacted, adjudged, and declared, that all lotteries whatsoever, whether of a public or private nature, are common and public nuisances, and against the common good and welfare of the people. The second section of the act prohibited, under the heavy penalty of 500 pounds, the setting up, erecting, making, exercising, keeping open, shewing or exposing to be played at, drawn, or thrown at, any lottery, play, or device, or causing, or procuring the same to be done, either by dice, lots, cards, balls, tickets, or any other numbers or figures, or in any other manner or way whatsoever. The third section imposes a penalty of 20 pounds on the person who shall sell, advertise, or expose to sale, any ticket or device whatsoever in such lotteries, plays, or devices. The act of 20th *January*, 1792, 3 *Sm. L.* 60, recites

the act of 1762, and declares a doubt, whether it extended to lotteries out of the state; it then prohibits, under the penalty of five pounds, the exposing or offering to sale, barter, or exchange, any ticket or chance, or other evidence of ticket or chance, in any lottery or other device, in the nature of a lottery, by whatsoever name it may be called, not authorised by the laws of this Commonwealth.

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By the act of 2d April, 1811, the disposition or offer to dispose of any lottery ticket not authorised by the Commonwealth, subjects the offender to a penalty not exceeding 2000 dollars, for the use of the Union Canal Company. The clause respecting lotteries in the act for regulating pedlars and vendors is repeated by the act of 1762. If that act was confined to wares sold by pedlars, and goods sold at vendues, the act of 1762, was intended to be more comprehensive in its nature, and it is so in its terms, to meet the increasing evil in whatever shape or form it might assume; whatever might be the device or its name, all lotteries whatsoever, either public or private, are declared to be nuisances, and against the common good; the pernicious consequences are stated in the preamble; as a remedy, all of whatsoever description, quality, device, or name, all are enacted, adjudged, and declared to be nuisances.

Our language must be strangely defective; it must be void of all precision and certainty, if human ingenuity could raise a doubt. A lottery is a game at hazard. By the act of 22d April, 1794, all games at hazard for money or other valuable things are prohibited. A lottery is a distribution of prizes by chance. Let us test the scheme of *Joseph Charles* by this definition. 200 lots were the prizes. The adventurer on receiving a certificate entitling him to such lot as might be drawn against his number, was to give his note for 350 dollars. Without speaking of the inequalities in value that might arise from local situation, there were two capital prizes; lot No. 24, entitled to an elegant new two story dwelling house, and is represented as of the value of 11,000 dollars; No. 28, to a large new barn and stabling, estimated at 3000 dollars. Now the man who paid 330 dollars may for this, draw by numbers either 11,000 or 3000 dollars; this chance depending on a drawing by numbers. All the lots were not estimated at 330 dollars; or the lottery owner must lose, for it gives up to the lucky adventurers two lots esti-

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mated at 14,000 dollars. But it is said, that however comprehensive the words may be, yet taking into view all the acts made on this subject, as distribution of land by lottery was unknown, at least seldom occurred, this could not be in the contemplation of the legislature. The cotemporaneous practice and usage under the law, furnished an evidence of this; for that two public lotteries had been had by the proprietaries for the disposition of their lands, and to support this two instances of lotteries of the proprietaries are stated. The first in 1735, was a lottery, but there was no law forbidding it. The act of 1729, for regulating pedlars and vendors, is admitted on all hands not to embrace a disposition of lands by lottery. The latter, whatever name may be and was given to it, was not a lottery, either in the letter, the spirit, or the intention of the framers of the act of 1762.

The proprietaries, in *February, 1769*, issued the advertisement notifying the people, that the land office would be opened at 10 o'clock in the morning of the 3d *April, 1769*, to receive applications from all persons inclinable to take up lands in the new purchase. Numbers assembled on that morning. Many had taken possession of the avenues to the land office the preceding evening. All were ready to rush in at the instant with their applications; very many desirous to apply for the same tracts. If it was first received this would establish the priority. All was riot and confusion; and apprehensions were entertained, that in the struggle, blood might be shed, and lives lost. The governor and proprietary agents adopted this expedient, to ascertain priority, and they gave the reasons for it; the 3d *April, 1769*, being appointed for the opening of the land office for the new purchase, and it being known that great numbers of people would attend, ready to give in their location at the same instant, it was the opinion of the governor, &c. that the most unexceptionable method of receiving the locations, would be to put them all together, (after being received from the people,) into a box or trunk, and after mixing them well together to draw them out and number them in the order they should be drawn, in order to determine the preference. See 2 *Sm. L.* 169. There was no sale or distribution of tickets; no money received for the land; and none was to be received, unless the applicant had owned the land he applied for. It was a distribution of favours, not a disposition of lands. No man could be de-

frauded, or family impoverished by this. It is not within the mischief intended to be prevented. It is not within the letter. It was not a mischievous or unlawful game, but a dispensation of favour and preference, without gain to the owner or loss to the applicant.

It has been again compared to allotment in partition by coparceners, joint-tenants or tenants in common. I cannot discern the smallest resemblance; there the parties have an unlimited interest in the lands; the allotments are equal; the drawing only gives a right of election to an equal allotment, there must be an allotment to each one of his purpart; some one must have the first right of choice; but the adventurers have neither held jointly, nor severally, undivided parts of the 200 lots. The interest arose when the number was drawn, and then it was a specific interest in the lot so numbered.

It is a miserable subterfuge, to say that this is not a lottery, because there are no blanks; for every holder of a certificate obtained a lot. The law would be a dead letter, if this device were to prevail. A lottery of money or other personals, precious wares; a gold watch and a pair of brass sleeve buttons, a silver thimble and a diamond necklace, the highest prize in money, 10,000 dollars; the lowest a groat; the very device is prohibited. *Dob. Ency. tit. Lott.* In 1748 Dr. *Rawlinson* proposed to the Society of Antiquaries a scheme of a very rich lottery of 400,000 shares without any blanks. The case before us, and the multiplicity of cases depending on this decision, shew it to be within the mischief, and it falls within the very letter of the law. To adopt the words of the act of 1792, the certificate was a ticket or chance, or evidence of a chance, in a lottery, or a device by way of lottery, by whatever name it may be called. All chances by way of lottery are illegal, and adjudged, enacted and declared to be nuisances, unless authorised by some act of assembly. The grand object of all lotteries in countries where they are authorised is, to raise money for the state, under the direction of government. See *Dob. Ency. tit. Lott.* for their history in England. By the stat. 10 *W. & M.* all lotteries are declared to be public nuisances; and all licenses, grants, and patents for the same are contrary to law. 4 *Bl. Com.* Nothing but an act of parliament in *England*, nothing but an act of assembly in *Pennsylvania*, can authorise them. All not authorised are

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1818. prohibited as against the public good. There is no distinction in reason or in the law between the disposition of personal property and of real, by chances ; the evil is as great in the one case as in the other ; the mischief appears to all our experience to be more extensive from land lotteries. If the law has slept, it is not dead ; the great evils in our day from the most pernicious of all kinds of gaming ; most pernicious because most extensive, have brought it into action ; the disuse of it has not repealed it ; our statute book is filled with act on act, 1762, 1792, 1811, prohibiting all lotteries under most severe penalties, and the justice of the country calls aloud for their execution. One argument yet remains to be disposed of. If I understand it, it is this: the policy of the laws went only to prohibit a species of lotteries that were frequent, and as land lotteries had rarely occurred, the legislature did not intend to provide against them. It is the duty of legislatures to foresee, and to meet and prevent all acts that tend to the destruction of industry ; that may produce vice and immorality ; they are not to wait until the evil has actually happened. Admit for the sake of argument, that lotteries of pedlars' wares, and other personal effects and money, had attracted the attention of the legislature, was it not provident and wise not only to prohibit the lesser evils which had happened, but to prevent the greater evils that might arise from any and every lottery of whatever nature, name, quality, or description. They have so done ; and is it for Courts to say, they did not intend it ; for though it may be admitted, that statutes are not to be extended by equity to cases which rarely happen, yet when the words of a statute do sufficiently extend to an inconvenience seldom happening, they are construed to extend to it as well as if it happened more frequently ; and it is no reason why it should not, because it happens but seldom. 6 *Bac. (Wils. ed.)* 388. Had the preamble to the acts cited only particular inconveniences it would not exclude any others for which a remedy is given by the enacting part. *Rex v. Athos*, 8 *Mod.* 144. Enacting words, if they take in the mischief, shall be extended to that purpose, though the preamble to the act does not warrant it. *Basset v. Basset*, 3 *Atk.* 205. It therefore appears most clearly to me, that this was a lottery not authorised by any law of the Commonwealth, but expressly prohibited by several laws. If so, it must follow, that

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the plaintiff below who seeks a remedy in a court of law on a contract forbidden by law, and declared to be a common nuisance, cannot recover. To support this it is unnecessary to load the case with a reference to particular authorities. I shall lay down the general principle, as applicable. All contracts which have for their object any thing which is repugnant to justice, or against the general policy of the common law, or the provisions of a statute, are void; and where a contract or agreement is entered into with a view to violate any of their general principles, there is no form of words, however artfully introduced or omitted, which can prevent courts of common law or equity from investigating the truth of the transaction. The principle which courts of justice must go upon is to enforce the performance of contracts not injurious to society; and it would be absurd to say, that a court of justice shall be bound to enforce contracts contrary to and against the public good; for no man shall come into a court of justice and say, give me a sum of money which I desire to have contrary to law. A party to an unlawful contract cannot recover through the medium of that contract. Nor can it make any difference whether the statute declares the contract to be void, omits so to do, or prohibits under a penalty; penalty is prohibition; but here are both penalty and prohibition.

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Such is the construction on this very lottery question, 6 Binn. 321, that in case of a lottery authorised by law, where the ticket had been sold subsequent to the time allowed by the act, it conferred no right to receive the prize. The objection sounds very ill indeed in the mouths of the plaintiffs in error; but it is not for their sake that the objection is allowed; it is founded on general principles of policy, which they shall have the advantage of contrary to the real justice between the parties. The principle of public policy is, that no Court will lend its aid to a man who grounds his action upon an immoral or illegal act. *Mitchell v. Smith*, 1 Binn. 110. Justice, as between these individuals, would require either payment of the money or reconveyance of the property; but principles of public convenience demand that the justice of the case shall yield to higher considerations, the operation of the precedent on public morals, and the public interest. It is for these reasons courts of justice will not assist an illegal transaction in any respect.

Judgment reversed.

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Lebanon.WEIDMAN *et al.* against KOHR.Wednesday,  
May 30.

IN ERROR.

A certificate, under seal of the secretary of the land office, "that he had carefully searched for a certain warrant, and the same could not be found," is legal evidence.

The declarations of the person under whom the plaintiff derived his title, made during the time when he owned the land claimed by the plaintiff, that his warrant and survey did not cover the land in dispute, are evidence.

Recitals in a patent, are not evidence against a person claiming under the Commonwealth, by title prior to the patent.

IN delivering the opinion of the Court, in this case, which was an action of trespass, *quare clausum fregerunt*, brought by *Kohr*, in the Common Pleas of *Lebanon* county, the Chief Justice has fully stated all the points in controversy.

*Hopkins*, for the plaintiffs in error.

*Godwin* and *Elder*, for the defendant in error.

TILGHMAN C. J. In this case there are three points for decision.

1. Whether a certificate, under seal of the secretary of the land office, "that he had carefully searched for a certain warrant, and the same could not be found," is legal evidence. By the act of 9th April, 1781, copies of deeds, entries, and papers of the land office, duly attested by the secretary, receiver general, or surveyor general, or their deputies, under their hands, and seals of office, shall be as good evidence as the originals. There certainly is a material difference, between the officers certifying a copy, and certifying that the original is not to be found. If the point were open, I should think, that much might be said against the evidence. But it is settled. There has been a long practice in favour of the evidence, the admission of it is attended with convenience, and, therefore, it must not now be questioned.

2. The second point is, whether the declarations of the person under whom the plaintiff derived his title, made during the time when he owned the land claimed by the plaintiff, that his warrant and survey did not cover the land in dispute, are evidence.

There can be no doubt but such declarations are evidence. Nothing is stronger than the confessions of the party interested against himself, and the privity between that party and the plaintiff renders his confessions evidence against the plaintiff. But the confessions of the same person, made after

his interest had ceased, would not have been evidence. This is the settled distinction.

3. Are recitals in a patent, evidence against a person claiming under the Commonwealth by title, *prior* to the patent?

This point was fully considered in the case of *Penrose v. Griffith*, 4 Binn. 231, and it was decided, that such recitals are not evidence.

I am of opinion, that the judgment should be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

### BURY assignee of BINKLEY *against* HARTMAN.

IN ERROR.

Wednesday,  
May 20.

THIS action was brought on a single bill assigned by the obligee to the plaintiff, according to the act of assembly passed on the 28th May, 1715. The defendant, the obligor, made a payment to the obligee two days after the assignment, but before he had received notice of it. The Court below charged the jury, that the payment was good against the assignee, provided, when the obligor made it he had no notice of the assignment. Whether or not this opinion was erroneous, was the question now presented for the decision of this Court.

Where a bond has been assigned agreeably to the act of assembly of 28th May, 1715, a payment made by the obligor to the obligee before notice of the assignment is

*Rogers*, for the plaintiff in error, agreed, that in the case of an equitable assignment, notice was necessary, because where a man asks the aid of equity, he must do equity; but this, he said, was a legal assignment under the act of assembly. Both parties were negligent, the assignee in not giving notice of the assignment, and the obligor in not demanding the bond before he made the payment; the equity of both was equal, and therefore the assignee having the legal property must prevail. The act of assembly declares, that the assignee may recover, in his own name, the amount due at the time of the assignment, and the cases cited from *Dallas*, which are sup-

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posed to prove, that a payment to the obligee after the assignment, but without notice of it, is good against him, certainly do not establish that position. In *Wheeler v. Hughes*,<sup>(a)</sup> there is a *dictum* of Chief Justice CHAW, and nothing more, that the obligor may set off all payments made before notice of the assignment; but the case itself is not applicable. The case of *Cummings v. Lynn*,<sup>(b)</sup> was a question, whether the assignment was under the act of assembly. In *Inglis v. Inglis*,<sup>(c)</sup> the contest was between two equitable assignees of a legacy, and there is nothing to support the doctrine contended for by the defendant in error, but a *dictum* of Chief Justice SHIPPEN, that payment before notice is good. An averment of notice in the declaration is no further necessary than to shew, that the obligor knew to whom to pay the money. In an action on a promissory note, no such averment is necessary. 1 *Chitty*, 320.

*Jenkins*, for the defendant in error. This is far from being a new question; but as some doubt appears to be entertained in relation to it, it is time it should be completely settled. In the case of bills of exchange, the indorsement passes the property divested of all equity on the part of the drawer; therefore if the drawer pays the bill without having it delivered up, it is at his own peril. But the assignee of a bond takes it subject to all the equity existing between the obligor and obligee, and therefore it is his duty to give notice to the obligor of the assignment.

The act of assembly had no other object in view than to give an action to the assignee in his own name; it did not intend to give to assigned bonds the same character as bills of exchange, or to lessen in any respect the equitable rights of the obligor. These rights have been repeatedly recognised by judicial decisions. In *Wheeler v. Hughes*, Chief Justice CHAW lays it down, that the obligor is let in for every equity which he had at the time of the assignment, or notice of it. In *Inglis v. Inglis*, SHIPPEN C. J. seems to treat it as a matter not to be disputed, that notice of the assignment of a bond ought to be given to the obligor. In *Wardell v. Eden*,<sup>(d)</sup> it was held, that until the defendant has notice of the assignment of a judgment, all payments by him are good. And in

(a) 1 *Dall.* 23.

(b) 1 *Dall.* 444.

(c) 2 *Dall.* 45.

(d) 2 *Johns. Cas.* 260.

*South Carolina*, the assignee of a bond holds it under all the equitable circumstances to which it was subject between the original parties, and must give notice of the assignment. *Da Costa v. Shrewsbury*.(a) *Newman v. Crocker*.(b)

The form of declaring too on an assigned bond shews the necessity of notice ; otherwise an averment to that effect need not be introduced into the *narr.*

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TILGHMAN C. J. The act of assembly enables the assignee to maintain an action in his own name for the recovery of the money mentioned in the specialty, or so much thereof as shall appear to be due at the time of the assignment, in like manner as the obligee might have done. It was not the intent of this act to make specialties negotiable in the same manner as bills and notes are made negotiable by the stat. 3 & 4 *Ann.* ch. 9. For it will be found, by a comparison of the statute and the act, that the makers of this act, had the statute before them, and designedly departed from it, in some important expressions. The construction of this act was well considered, and I think, fixed, by the Supreme Court, so long ago, as the year 1776, in the case of *Wheeler assignee of Baynton v. Hughes*, 1 *Dall.* 23. Chief Justice CHEW gives his opinion, that the main intent of the act was, to enable the assignee to sue in his own name, and to prevent the obligee from releasing, after the assignment ; and that the assignee takes the bond, at his own peril, subject to every defalcation which might have been made against the obligee by the obligor, at the time of the assignment, *or notice of it*. The same opinion is expressed by the late Chief Justice SHIPPEN, in *Inglis v. Inglis's executors*, 2 *Dall.* 49. In the state of *Maryland*, there is an act of assembly enabling the assignee of a bond to maintain an action in his own name, and there the law has been held in the same manner, *viz.* that payment by the obligor to the obligee, before notice of the assignment, is good. These decisions have been founded on equity and convenience. The assignment operates as a new contract, between the obligor and the assignee, commencing upon notice of the assignment. Any other construction would be extremely inconvenient ; for the obligor would never be safe in paying the interest or part of the principal, unless the bond was produced, and a receipt indorsed. This

(a) 1 *Bay.* 211.

(b) 1 *Bay.* 247.

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would be throwing a great hardship on one who may live at a distance from the obligee, and has to send his money by a third person. Besides, there is a default in the assignee who neglects to give notice, and therefore he does not stand on equal equity with the obligor. In *Wardell v. Eden*, (2 *Johns. Cas.* 260,) the assignee of a judgment was recognised by the Court, as the complete owner in equity, and they declared, that all acts of the plaintiff, subsequent to the assignment, and affecting the validity of the judgment, were fraudulent; yet at the same time they held, that until the defendant received notice of the assignment, all payments made by him to the plaintiff were good. I am, therefore, of opinion, that upon the reason and intent of our act of assembly, and upon principles of general convenience and equity, as well as upon authority, payment by the obligor to the obligee, before notice of the assignment, is good. The judgment of the Court of Common Pleas should, therefore, be affirmed.

GIBSON J. By the act of 28th *May*, 1715, it is provided, that the assignee "shall commence and prosecute his, her, or their actions at law for the recovery of the money mentioned in such bonds or notes, or so much thereof as shall appear to be *due at the time of such assignment.*" The plaintiff, therefore, having the legal title, shall recover, unless the defendant has greater equity as to payments made to the obligee after the assignment, but before notice of it. That will depend upon whether the negligence of the obligor in not assuring himself, that his bond had not been assigned when he made the payment, be not at least as great as that of the assignee in not giving notice. *Andrews v. Beecher*, (a) *Wardell v. Eden*, (b) and *Newman v. Crocker*, (c) were equitable assignments of choses in action; so also were all the British cases on the same subject. Notice of an *equitable* assignment is always required; and the reason for it is a plain one. Not being an assignment made in pursuance of the terms of the contract, and not being recognised by the common law, but merely tolerated by courts of equity to effect purposes of convenience, an obligor *is not to presume an assignment to have been made*, and therefore negligence is not to be imputed to him for making a payment without requiring

(a) 1 *Johns. Cas.* 11.

(b) 2 *Johns. Cas.* 258.

(c) 1 *Bay. Rep.* 246.

the production of the instrument. An assignment of a chose in action is considered in equity as a declaration of trust. *Lord Carteret v. Paschal*, 3 P. Wms. 197. Co. Litt. 232. b. n. 1. and a party without notice of a trust, and in possession of no circumstance to put him on an inquiry that may lead to a knowledge of it, shall not be affected by it. But the case of a legal assignment made in pursuance of the very terms of the original contract, is widely different. What man of any pretensions to prudence would pay an obligee, either in full or in part, without ascertaining whether he were, at the time, entitled to receive the money; particularly when, by the terms of the agreement, the obligee had stipulated for a right to substitute another, as creditor in his stead? It is said, the obligee is not bound to produce the bond, and that therefore a demand of it would be without effect. I cannot see any force in this argument. The obligee is not bound to receive a part of what is due; and if a part be tendered it is received, if at all, as a matter of courtesy to the obligor. He is not entitled to his bond until he tender a sum which the obligee is bound to receive, and if he tender a part he cannot complain if the latter receive it on his own terms. Receiving benefit from a *pro tanto* abatement of interest afterwards accruing, the obligor should not complain if he bore any loss that arose in consequence of what was a personal accommodation to himself. But can it be doubted, but that a conditional tender of the *whole sum due* would be good, and if properly pleaded, would save interest and costs? On payment in full, the obligor is entitled to have his bond; and a partial payment is a matter of compromise between the original parties, not a matter of right in the obligor, and ought not to affect third persons. With regard to promissory notes and bills of exchange, which are subjects of legal assignment, the rule is, that every payment to a person not actually the holder, is at the risk of him making it. It is true, that bonds though assignable under our act of assembly are not strictly negotiable, and therefore do not approach so near the nature of a circulating medium as bills and notes; but I can see no reason on that account for not applying the same rule to them. In point of justice the principle is the same, as regards each. It is said remittances from a distance could not be so conveniently made, if the construction contended for by the plaintiff in error, should prevail.

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1818. But may not an agent be employed to ascertain all necessary circumstances? If the remittance be made directly to the obligee, this of itself is negligence; and the obligor ought not to be permitted to consult his convenience at any body's risk but his own. Although the rule would require a greater degree of caution than is usual in transacting business, no real hardship would ensue; for where the interest of a third person, not privy to the transaction, is to be affected, the slightest negligence ought not to be tolerated. If the obligee was of doubtful character it would be flat imprudence to trust him; and if his character were above suspicion at the time, the person that reposed confidence in him ought to suffer by his deceit, rather than one who did not. By requiring this prudent degree of circumspection on the part of the obligor, fraud will be put completely out of the power of the obligee. On the other hand, if notice be the criterion, no human alacrity may be able to prevent it. The assignee may ride post haste to find the obligor, and failing to intercept him on his way to make a payment, may lose his money. This, it may be said, is an extreme case; but it might occur; and such cases best serve to test the soundness of a principle.

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The case of a mortgage, appears, at first view, irreconcilable with this doctrine. A mortgage is assignable *at law*, there being a legal estate or term which is the subject of a conveyance, and yet payments to the mortgagee, without notice, must in chancery be allowed by the assignee. *Williams v. Sorrell*, 4 Ves. 389. But the reason is, that it is apparent on the face of the title, that the conveyance of the legal estate is not absolute, *but as a security* for a debt; and that equity considers the real transaction as an assignment of a debt from A to B, that debt being *collaterally* secured by a charge on real estate. *Matthews v. Walkwyn*, 4 Ves. 128. So that after all, the assignment is not in equity held to be of the *legal estate* in the land, but of a chose in action, and the assignment is therefore only equitable. But the case of *Baldwin v. Billingsley*, 2 Vern. 539, was, in principle, precisely the present case. It was the case of a bond. Two trustees of money for the separate use of a *feme covert*, lend it to a third person, who gives bond to the trustees, and the trust is declared in the condition. The bond is kept by the *feme*, and one of the obligees having received 100*l.* for, and on account of the obligor, gives the latter a receipt, as for so much received to the use

of the *feme*; this obligee becomes insolvent, and it was held by the lord keeper that this was not a good payment; that the obligee being a trustee had a power to receive and to pay; to put out and call in, but the trust being particularly *taken notice* of in the condition, the obligor ought to have been cautious how he paid the money, the leaving the bond in possession of the *feme* being equivalent to an *assignment* to her; that the obligee might have received if he had *had* the bond, but having delivered it over to the *feme*, he had dismissed himself of the trust, and therefore the payment made by the obligor "*without seeing the bond,*" was not good. There was no pretence of actual notice; the decision did not proceed on that ground. This case, therefore, goes the whole length of the doctrine I contend for. It establishes the point that where the obligor, from the terms of the contract, knows that the obligee may have divested himself of the right of receiving, a payment made without calling for information as to that fact by requiring the production of the instrument, is bad against an assignee.

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On recurring to precedents of declarations they are found uniformly, to contain an averment, that the defendant had notice of the assignment. I will not say this averment is unnecessary, although in the case of the indorsement of a promissory note it has been held so. But I think it clear, that it has nothing to do with payments made to the obligee after the assignment. The obligor ought to have an opportunity to pay his bond without incurring the costs of a suit; and for the purpose of ascertaining the person to whom payment is to be made, notice of the assignment may be very material to him. It is clear, that the notice is for the benefit of the obligor and not of the assignee; otherwise where a payment to the obligee is not insisted on, it need not be averred, yet I doubt that if such averment be necessary in any case, a declaration without it would be bad on demurrer. I therefore do not consider the form of the precedents as evidence that the law has been considered as being different from what I contend for. A long uninterrupted practice, if not pregnant with injustice, although it might be deemed erroneous in principle, would be decisive. But I know of no such practice. The point is of the first impression, and has never received a judicial decision in this state. In *Wheeler assignee of Baynton v. Hughes' executors*, (a) Chief Justice CHEW cau-

(a) 1 Dall. 33.

1818. tiously avoids expressing an opinion on it. "The assignee," says he, "stands in the same place as the obligee, so as to let in every defalcation which the obligor had against the obligee at the time of the assignment or notice of the assignment," without saying which. The point did not arise, and of course was not decided. In *Cumming's assignee v. Lynn*,<sup>(a)</sup> it was held, that the covenant implied by the word *assigned*, extends only to this; that the assignee should receive the money from the obligor to his own use, and that if the obligee should receive it, then he should be answerable over. Hence an authority in the obligee to receive it, it is thought, might be inferred. But clearly, that does not follow. An *express* covenant by the obligee to pay over the money in case he received it from the obligor, would not confer on the former a right to give an acquittance; and an implied covenant could have no greater operation. He has no authority to receive any thing, of which he could not enforce payment by action. It is not pretended, that without actually receiving the contents of the bond he could release it after assignment, whether the obligor had notice or not; and it is incomprehensible, to me, how he can discharge it by an act of a lower nature. I therefore take the effect of the decision to be, that the assignee may, at his election, consider a payment made to the obligee after assignment, as valid, and proceed against him on his covenant; but it by no means follows, that he may not, if he please, treat it as a nullity, and proceed against the obligor on his bond; and I will not say, that he may not proceed against both at the same time; although, as to that I give no opinion. In *Virginia*, where bonds are assignable as in this state, it was thought that an express provision of the act of assembly was necessary to render payments made before notice, valid; yet in every other respect the law of that state corresponds with our act.

At the opening of the argument, my impressions were strongly opposed to my present opinion. The result of an attentive consideration of the arguments of counsel is a settled conviction, that the evidence was improperly admitted. I therefore think, the judgment ought to be reversed.

DUNCAN J. The only error assigned on this record is in the charge of the Court, in instructing the jury, that a *bona*

(a) 1 *Dall.* 444.

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*fide* payment by the obligor to the obligee, is a discharge 1818.  
against the assignee of the bond, though such payment has *Lancaster.*  
been made after the assignment, but before notice; for this is  
in substance the opinion excepted to.

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This case has been held under advisement as one of very general concern, and which, as is contended, never has directly received a judicial decision in *Pennsylvania*. I have considered it with all that anxiety its importance requires; but can discover no solid reason to change the opinion I had formed on the argument; and on a very full examination of the subject, I find a concurrence of practice, principle, and authority, to support the opinion delivered by the Court of Common Pleas. The operation of an assignment of a *chose in action* not negotiable, but which may be assigned, and the assignee bring suit in his own name, will be considered. The operation of an assignment in equity, of instruments not assignable at law, so as to enable the assignee to bring suit in the name of the assignor, for his use, will likewise be considered; and the operation of the assignment of a bond under the act of 1715, so far as it has received judicial decision, and as opinions have been delivered on the question now under consideration, growing out of the principles established by judicial decision, though not in direct adjudication. A mortgage is assignable at law; the assignee has all the remedies in his own name, that the mortgagee had on the mortgage, both in law and equity; he may bring ejectment at law, or he may foreclose in equity. A mortgage is assignable; but where it is assigned without the assent of mortgagor, the assignee must take it only on the same terms, subject to the same equity as in the hands of assignor. *Pow. on Mort.* 140. *Ib.* 427. 2 *Vern.* 428. 692. 784. After assignment of a mortgage, payments to the mortgagee before notice must be allowed against the assignee. 1 *Bac. (Wils. ed.)* 249. *Sugd.* 466. So if a bond be assigned, the bond must be delivered, and notice must be given to the debtor. *Ryal v. Rolles*, 1 *Atk.* 177. Otherwise debtors may safely pay the original creditor. A policy of insurance, resembles a bond for the payment of money at a future day. 1 *Ves.* 330. Though not assignable at common law; yet on mercantile principles it is, and the assignee may bring suit in his own name; yet underwriters may set off a debt due by the assignor, at the time of effecting the policy; and the assignee takes it subject to



1818. all equity, and defalcation to which it is subject before assignment. *Gourdon for use of assignees v. Insurance Company of North America*. 1 Binn. 430, (note.)

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There are a variety of decisions in the several states and in *England* on the effect of such assignment, judiciously selected, and perspicuously arranged by Judge WILSON, in his valuable edition of *Bacon*, 1 vol. 249, *Assignment*. (What things are assignable,) by which it appears that courts of law now take notice of and recognise the right of him who has the beneficial interest, and extend to him all the protection of assignments, except only that the assignor cannot sue in his own name. Courts of equity will protect an assignment of a *chose in action* as much as the law will that of a *chose in possession*. 2 *Comy. Con.* 266. So will courts of law now; it is a nicety not now regarded; the form is only different from the assignment of a thing in possession; it being by way of trust. The substance of the rule, that the *choses in action* are not assignable, is gone, and the shadow only remains. The assignee is recognised as the real party, except as to bringing the suit in his own name. The rule that *choses in action* are not assignable, is now considered in a court of law as a maxim, without use, and without convenience. *Tuttle v. Bebee*, 8 *Johns.* 118.

In *Pennsylvania*, the person having the beneficial interest is considered as the substantial plaintiff, though his name does not appear on the record, and the defendant may plead that the action was for his use, and set off a debt due from him. 1 Binn. 496. *Canby v. Ridgway*. A bond then is assignable for a valuable consideration, and the assignee alone becomes entitled to the money, and if the obligor after notice of assignment pays the money to the obligee, he will be compelled to pay it over. *Constant v. Farmer and another*, 2 *Mass. Rep.* 97. I refer to the numerous authorities in *Wils. Buc.* above referred to, and to *Tuttle v. Bebee*, 8 *Johns.* 118. and *Underwood and others v. Van Allen*, 12 *Johns.* 343. When then does the duty imposed on the debtor to the assignee arise? On notice of the assignment. The rule in equity is, that an assignment of a *chose in action*, *not negotiable*, imposes no duty on the debtor until notice of such assignment is given. *Jones v. Miller*, 13 *Mass. Rep.* 37. PARKER Ch. J. in delivering the opinion of the Court, observes, that the question was, whether the facts proved shew such an assign-

ment in equity as will be supported by courts of law in all respects, except permitting an assignee to bring suit in his own name. The affirmative is pronounced. He then proceeds to state, that the contract between assignee and payee is operative only between them when some act takes place which brings the maker of the note into contract. This act is notice to him, and after such notice it becomes entirely immaterial to him who shall be his creditor, as payments or lawful off-sets, existing before such notice, will be allowed him, and all subsequent payments may as well, for his interest, be made to the assignee as the original creditor. So early as 1776, the effect of an assignment was settled. *Wheeler's assignee v. Hughes' executors*, 1 Dall. 23. Ch. J. CHEW, in his very able opinion, has considered the question in all its bearings; the operation of the assignment is clearly defined. We are clearly of opinion, says the Chief Justice, that an assignee takes the bond at his own peril, and that he stands in the same place as the obligor, so as to let in every defalcation which the obligor had against the obligee at the time of the assignment, or notice of the assignment. The only intention of the act being to enable the assignee to sue in his own name, and prevent the obligor from releasing after assignment; he clearly and unanswerably proves, the intention, and marked difference between the act and the stat. 3 & 4 Ann. c. 9.; in some instances adopting the very words of the statute, and in others using different language and adopting a different provision. The statute contains these important provisions to make notes negotiable as bills, "to enable the assignee to receive what shall be due in like manner as indorsee of a bill of exchange." The act omits this provision, but substitutes one literally different, entitling the assignee to recover the money that shall appear to be due. Though the question of payment, after assignment, did not directly arise; yet the decision was on the principle, that payments, after the assignment and before notice, were valid. The Chief Justice proceeds to observe, "an argument of force with us, not mentioned by defendant, arising from the wording of the act; the words, 'so much as shall appear to be due,' relate to the time of the trial and not to the time of the assignment; they are in the future tense." The objection which is now made was then made by the plaintiff's counsel; that it was the obligor's fault not to have the pay-

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ment indorsed on the bond. This received the most satisfactory answer; that this was not in the power of the party; if the obligee was a bad man, he might refuse to make it. Conforming to these principles, in *Cummings' assignee v. Lynn*, 1 *Dall.* 444, it was decided, that the covenant implied, by the word assigned, extends only to this, that the assignor shall recover the money to his own use, and if the obligee should receive it, he would be answerable over. The rule in the assignment of bonds, was adopted as to promissory notes in *M'Cullough v. Houston*, 1 *Dall.* 441.

Chief Justice M'KEAN states, that the situation of this country is not the same as that of *England*, as to promissory notes; the legislature of *Pennsylvania* has not found it necessary to hold in equal respect the negotiability of promissory notes. When the act of 1715 was passed, promissory notes were little used; they were given for small debts, and seldom passed out of the hands of the payee before payment; the object of the act was simply to enable the indorsee to sue the drawer in his own name:

Chief Justice SHIPPEN observes, that bonds may be assigned by our law, so as to enable the assignee to bring suit in his own name, but without the other qualities of negotiable paper. *Gourdon for the use of his assignees v. North America Insurance Company*. Bills of exchange and notes payable to order in the city of *Philadelphia*, are properly negotiable paper, after such notes have been *bona fide* indorsed in a course of trade. *Baring v. Shippen*, 2 *Binn.* 165.

Chief Justice TILGHMAN observes, that a bond, though assignable under our act of assembly comes not within the mercantile idea of a negotiable instrument; because it is liable in hands of assignees to every plea, discount, and objection which might have been offered by the obligor against the obligee. Negotiable papers are bills of exchange, &c. which pass by indorsement, not subject to any right of discount between the parties. Before the act of 27th *February*, 1797, there was no negotiable instrument in *Pennsylvania*, but bills of exchange; that act gives this character to notes of a certain description, and to nothing else. If there is no defence by either payer or indorsor except what appears on the note itself, then it is negotiable; but if it is liable in the hands of every one to discount and objection of the payer, then it is assignable. merely, and this is be-

yond all doubt the situation of a bond. Where the instrument is negotiable in its nature, the indorsement transmits an absolute right, which cannot be objected to by the payer; but where it is assignable, he takes it subject to every discount and objection, unless the payer has been resorted to and admitted the debt; such precisely is a mortgage. The holder of negotiable paper is not considered in the light of an assignee of payee; and therefore he holds discharged of all latent equities between the parties; this is the natural effect of unqualified negotiability. The only intent of the act of assembly was to enable the assignee to sue in his own name, and prevent the obligee from releasing after assignment; by Chief Justice CHEW, *Wheeler assignee v. Hughes*, 1 Dall. 23.

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The object of the act, says Chief Justice M'KEAN, was simply to enable the indorsee to sue the drawer in his own name. *Ludlow v. Bingham*, 4 Dall. 47.

Bonds, says Chief Justice SHIPPEN, may be assigned by our law, so as to enable the assignee to bring suit in his own name, without the other qualities of negotiable instruments. *Gourdon v. North America Insurance Company*, 1 Binn. 432. Now if the only intent of the act of 1715, the sole object of the legislature was simply to enable the assignee to sue in his own name without giving any other character, or bestowing any other protection on the assignee, it follows without doubt, that the absolute legal right to the money is not transferred, but barely the right to sue in the name of the assignee; not changing the situation of the obligor, who only becomes a party to the contract when he receives notice.

Sir THOMAS PARKER, in *Ryall v. Rolles*, 1 Ves. 367, lays down the rule thus: as to instruments not negotiable, (for bills of exchange and promissory notes are :) Bonds assigned, they must be delivered, and such delivery of the bond on notice of assignment will be equivalent to the delivery of the goods, for the debtor cannot afterwards justify payment to the assignor. The debtor may safely pay the money to the person who had, without his knowledge, ceased to be his creditor; the debtor would act *bona fide* in making the payment, and it would be unjust to make him pay it again. Since the decision of *Wheeler assignee v. Hughes' executors*, 1 Dall. 23, Judges have, in *Pennsylvania*, so considered and declared it.

1818. **Pres. SHIPPEN**, in *Inglis for the use of Reed v. Inglis's executors*, observes, much has been said on the point of notice, and it is true, that if the obligee of a bond assign it, notice ought to be given to the obligor to prevent him paying the money over. In *1 Smith*, 92, the law is laid down correctly. If the obligee of a bond assigns it, notice ought to be given to the obligor to prevent his paying the money to the obligee who has parted with his interest.

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I do not consider these declarations of a succession of Judges, who, to soundness of judgment, joined accurate knowledge and long experience, as mere *obiter dicta*, but as declarations of the law itself, as arising from principles necessarily flowing from the nature of the circumscribed negotiability of these instruments. It is too late now to take this act up, and with the present opinions of the sanctity which should attend instruments assigned, or the extension of paper credit, to extend to them a protection not in the contemplation of the law ; nor to extend the field of negotiable instruments farther than the legislature have done. The rule established is a safe one ; affording to mercantile paper all the protection which its negotiability demands ; and settling the right of other instruments not negotiable, but assignable, on principles of equity and good conscience. The obligor knows the obligee, but how can he know of the assignment ? The assignee knows the obligor, or he would not take the assignment ; it is in his power to give the notice ; it is his duty so to do ; until this is done, there is no contract between him and the obligor. This is an answer to that which was pressed with so much force by the counsel for the plaintiff in error, that the assignment was a legal one ; that the obligor was guilty of neglect in not having the payment indorsed, or his bond given up, if paid in full. If the equity of the parties were equal, the law must prevail ; but from the view which I have taken of this case, the law is with the defendant. Both are innocent persons, having suffered, or being likely to suffer, an injury ; consequently equally favoured in equity. In such case, therefore, equity will stand indifferent, and will lend aid to neither of them, but will leave the law to take its course. The assignee runs the risk between the time of the assignment and notice that the debt may be paid to his assignor ; he depends on his covenant, that the assignor will repay any money he may receive from the obligor ;

he has his security and indemnity, and to this he must resort. What is the difference between a *chase in action* assignable only in equity, and a *chase in action* assignable under the act of 1715? This and this only, that assignee may, under the act, sue in *his own name*.

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If this were not the law, there could be no partial payment, for the obligee might refuse to indorse; there could be no remittance from a distance; none on a bond alleged to be lost; no mutual credit, which the debtor might give on the confidence of his bond remaining in the hands of the obligee. These principles are so consistent with the limited negotiability of the instrument; so consistent with the whole system of bonds assignable; have been so often recognised by our highest judicial tribunals, that were I even of opinion, that the adoption of a new rule might be attended with some convenience; might afford a greater facility to the passing and assignment of these instruments, I would not possess sufficient fortitude or rashness to set up my private judgment against the opinions of the very learned Judges who have preceded me, and overthrow what I consider has now become the settled law of the land. But I consider the ancient long established rule as the safest one, and that the imaginary benefits some may suppose would arise from the introduction of a new rule, would be greatly overbalanced by the real inconvenience, injustice, and evil which would flow from the destruction of the old one.

I am most clearly of opinion, that the opinion delivered in the Court of Common Pleas, is correct, and that the judgment be affirmed. In the Supreme Court of Errors in *Connecticut*, *Woodbridge v. Perkins*, 4 Day. 377, in the case of an assignment of a bond or note of hand, there must be a delivery of the bond, or note to the assignee; and notice of the assignment must be given to the obligor or promissor; for until that is done, the obligor or promissor remains a debtor to the obligee or promisee.

Judgment affirmed.

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Lancaster.**MORRISON against WEAVER.**

IN ERROR.

*Wednesday,*  
*May 20.*

No appeal lies from the judgment of a justice of the peace, in a matter exceeding one hundred dollars, referred to him by consent, under the 14th section of the act of 20th March 1810. Nor will any act done by the appellee, tending to shew an acquiescence in the appeal, render it good.

ON the return of the record in this case on a writ of error to the Court of Common Pleas of *Lancaster* county, it appeared, that the plaintiff and defendant, agreeably to the 14th section of the act of assembly of 20th March, 1810, submitted to a justice of the peace a matter exceeding one hundred dollars in value. Referees were appointed by consent, on whose report judgment was rendered for the plaintiff. The defendant entered an appeal to the Common Pleas, which the plaintiff moved to quash. During the pendency of this motion, he entered a rule of reference under the arbitration law, and the arbitrators reported in his favour the same sum for which judgment had been given by the justice: The defendant then obtained a rule, to shew cause why the award of the arbitrators should not be set aside. The Court ultimately quashed the appeal, and this was the error now assigned.

The cause was argued by *Shippen* and *Porter*, for the plaintiff in error, and by *Montgomery*, for the defendant in error, after which

The opinion of the Court was delivered by

GIBSON J. If the jurisdiction of the justice were compulsory and not the parties own choice, I would incline, as far as latitude of construction might go, to support the appeal. But the common objection of deprivation of trial by jury does not apply in this instance, and I, therefore, see no reason to suppose the legislature intended those provisions of the one hundred dollar act, which give an appeal in cases within the limit of the justices' compulsory jurisdiction, should also be applied to those in which he obtains jurisdiction by the assent of the parties. An appeal, as regards the latter, is certainly not expressly given; and this Court cannot supply that which the legislature has totally omitted, even though we should suppose the omission arose from an over-

sight. But I cannot think the legislature in fact intended there should be an appeal, or that there was any omission in the case. Why not as well give it in case of a voluntary reference to arbitrators? I consider the justice acting under the 14th section of the arbitration law, rather in the light of an arbitrator having power to enforce his own award, than a magistrate. He has no jurisdiction but what is conferred on him by the assent of the parties; and it is of the very nature of such jurisdiction to be final.

But it is said by the plaintiff in error, though no appeal be given by the act, yet it having been actually taken, and acquiesced in by the opposite party, who became an actor in the Common Pleas, that this in effect was the inception of an amicable action and a proceeding *de novo*. If this were admitted, the plaintiff would recover a double satisfaction; for the judgment of the justice would remain before him unremoved and in full force, whilst the plaintiff would also have the fruit of his judgment in the Common Pleas. But it would be a distortion of intention to construe an acquiescence in an appeal where none lay, to be an agreement to consider the matter as an amicable action; and it is settled law, that the proceedings on appeal are not *de novo*; but the inception of the suit is still considered to have been before the justice, and the proceedings in the Common Pleas a continuation of its prosecution. In *Moore v. Wait*, 1 *Binn.* 219, the inception of the suit could not be carried back to the proceedings before the justice; for, having exceeded his jurisdiction, the whole was a nullity, and of course there was nothing to remove or appeal from. The plaintiff who took the exception, had filed a declaration and prosecuted the suit to judgment; yet it was held, his previous assent to the proceedings would not support them, or preclude him from objecting. It is certain, that a general appearance and acquiescence will cure an *irregularity* in the manner of taking an appeal, but nothing will enable the Court to entertain it where jurisdiction of the appeal is not given by law. The judgment must be affirmed.

Judgment affirmed.

1818.  
Lancaster.  
MORRISON  
v.  
WEAVER.



1818.

Lancaster.Wednesday,  
May 30.| SPANGLER *et ux.* against RAMBLER.

A decree of the Orphans' Court refusing to confirm an inquisition for the partition of lands, under the intestate law, and setting aside the proceedings in consequence of the exhibition of a paper purporting to be the last will of the person who died seized, the validity of which had not been tried under an issue directed by the Register's Court, was affirmed by this Court, notwithstanding the heirs at law had recovered a moiety of the land, in an ejectment against the widow, who claimed the whole under the asserted will, and parol proof was given, that the validity of the will was directly in issue in that suit.

ON an appeal from the Orphans' Court of *Lebanon* county, the case appeared to be this:—

*George Spangler* and *Barbara* his wife, petitioned the Orphans' Court for a partition of the lands of *Michael Rambler*, deceased, who was supposed to have died intestate, leaving a widow, *Eve Rambler*, the appellee, but no children. On this petition, the Court awarded an inquest to make partition. Partition was made, and the inquest returned; upon which the widow exhibited a writing purporting to be the last will and testament of the said *Michael Rambler*, and prayed that the proceedings might be set aside. On the other hand, the petitioners urged the confirmation of the partition, and gave in evidence the record of an action of ejectment, in which the heirs of the said *Michael Rambler* had recovered an undivided moiety of his real estate against his widow, the said *Eve Rambler*, who was in possession of the whole, and claimed it by virtue of a devise in his will. Parol evidence was also given, that on the trial of the ejectment, the validity of the pretended will of *Michael Rambler* was brought into question, and inasmuch as the title of the plaintiffs was inconsistent with the will, the petitioners insisted, that the jury had by their verdict decided, that *Michael Rambler* died intestate. In consequence of the exhibition of the paper purporting to be the will of *Michael Rambler*, the Orphans' Court refused to confirm the partition, and set aside the proceedings; upon which the petitioners appealed to this Court.

*Hopkins*, for the appellants, contended, that the validity of the will of *Michael Rambler* having been fairly and fully in issue, in the ejectment brought by his heirs, the judgment in that suit while in force avoided the will; and of course the land should have been divided as the estate of an intestate. And to shew the conclusiveness of judgments of courts of competent jurisdiction on a point in issue before them, he cited 3 *Bl. Com.* 24. *Bond v. Gardner.*(a) *Simpson v.*

(a) 4 *Binn.* 221.

*Hart.*(a) *Gelston v. Hoyt.*(b) *Moses v. McFerlan.*(c) *Phill.* 1818.  
*Ev.* 234. *Lancaster.*

SPANGLER  
 et ux.  
 v.  
 RAMBLER.

*Wright and Godwin*, for the appellee, did not deny the general position which the authorities cited on the other side went to establish, but insisted, that the rule did not govern this case, because in an ejectment one verdict was not conclusive of the title, and besides if *Michael Rambler* had died intestate, the plaintiffs would, as his heirs, have been entitled to recover the whole instead of a moiety, for which alone a verdict was found in their favour. The jury, they said, founded their verdict upon the idea, that the widow was entitled to one-half the land in fee simple; but if this inquisition stand, she will lose the fee simple of the whole. The verdict, therefore, does not support the inquisition. The proper way to try the validity of a will is by an issue of *devisavit vel non* directed by the Register's Court, and until that be determined the Orphans' Court cannot proceed as if there were an intestacy. They cited 7 *Bac. Ab.* 381. *Brommell v. Kerridge.*(d) Act of 19th April, 1794.(e)

The opinion of the Court was delivered by

TILGHMAN C. J. When a writing is exhibited as a last will and testament, and a *caveat* filed against the probate of it, either party may demand a trial by jury; and in such case the Register's Court directs an issue to determine the validity of the will, to be tried in the Court of Common Pleas. The issue being tried and returned, the Register's Court are to take the fact as settled. With regard to *personal estate*, the decision is absolute; but the verdict on the issue is not considered as conclusive with respect to *real estate*. The party who is dissatisfied may have the title tried in an ejectment. If an issue had been sent from the Register's Court, and the writing exhibited as the will of *Michael Rambler* been determined to be no will, it would have been the duty of the Register's Court to have taken for granted, that *Rambler* died intestate, and the Orphans' Court ought to have proceeded to a partition of his lands. But in this case, no issue was sent, and therefore the Orphans' Court were not

(a) 1 *Johns. Ch. Cas.* 91.

(b) 1 *Johns. Ch. Cas.* 543.

(c) 2 *Burr.* 1009.

(d) 1 *Eq. Ab.* 406.

(e) *Purd. Dig.* 227.

1818. obliged to consider it as a case of intestacy. The record of the ejectment does not, upon its face, shew any question upon the will of *Rambler*, and even when explained by parol evidence, it is not free from obscurity, for, if *Rambler* died intestate, the verdict should have been for the plaintiffs for the whole. It is true, that the widow was entitled to one-half of the land, during her life, her husband having left no issue; but she had no right to enter and take this half, until it was legally assigned to her. Besides, one verdict and judgment in ejectment is not conclusive of the title, and therefore the Orphans' Court might well refuse to make partition until an issue sent from the Register's Court was decided. This issue it was the duty of the Register's Court to order, because without it, the right to the personal estate of *Mich. Rambler* could not be decided. To make partition of the whole real estate, while the question whether will or no will, remained in a state of uncertainty, might be productive of such inconvenience, that no Court would order it, unless absolutely enjoined by law. I am, therefore, of opinion, that, considering the circumstances of this case, at the time when the inquest of partition was returned, the Orphans' Court did right in setting aside the proceedings, and their decree should be affirmed.

Decree affirmed.

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### STEWART against The Commonwealth.

Thursday,  
May 21.

IN ERROR.

ON a writ of error to the Court of Oyer and Terminer of the county of York, it appeared, that an indictment was found by the grand jury, that *George Stewart, &c.* the dwelling house of one *Abraham Miller, &c.* "feloniously and burglariously did break and enter, and sundry promissory notes for the payment of money of the value of eighty dollars, of the goods and chattels of the said *Abraham Miller*, in the said dwelling house, then and there being found, then goods and chattels of A B," is too vague and uncertain. The notes should be more particularly described, and it should be set forth that the money was unpaid on them.

and there feloniously and burglariously take, did steal, and carry away," &c. 1818.

Lancaster.

And further, that the said *George Stewart*, &c. "with force and arms, sundry promissory notes for the payment of money of the value of eighty dollars, of the goods and chattels of the said *Abraham Miller*, did steal, take, and carry away," &c. STEWART  
v.  
The Commonwealth.

The jury found the defendant guilty, and the following reasons were filed in arrest of judgment.

1. That no crime was laid in the indictment.
2. That the notes said to have been stolen, were not stated to have been notes of a chartered bank.
3. That no intention to commit a felony, was laid in the indictment.

The case was argued in this Court, on the above exceptions to the indictment, by *Carter*, for the plaintiff in error, who cited the act of 30th *January*, 1810, *Pamph. L. 14. 4 Bl. Com. 227. 1 Hale, 559. 561. 2 Hawk. b. 2. ch. 25. s. 74. Id. b. 2. ch. 25. s. 60. Act of 19th March, 1810. Pamph. L. 87. Spangler v. The Commonwealth*,<sup>(a)</sup> and by

*Bacon*, for the Commonwealth, who referred to 2 *Sm. L. 533. 579, 580. 2 East's Cr. L. 515. 2 Hob. 193. 3 Binn. 537.* Opinion of YEATES J.

The opinion of the Court was delivered by

DUNCAN J. The judgment should be reversed, because it does not appear by the indictment, that any felony was committed, or intended to be committed, the charge of felony being too vague and uncertain, *viz.* that "the defendant feloniously stole, took, and carried away sundry promissory notes for the payment of money, of the value of eighty dollars, of the goods and chattels of the said *Abraham Miller*." The notes should have been more particularly described, and it should have been set forth, that the money was unpaid on them.

Judgment reversed.

(a) 3 *Binn. 533.*

1818.

Lancaster.LANDIS *against* SHAEFFER.Monday,  
May 25.

IN ERROR.

When upon an appeal by the defendant from an award of arbitrators, the verdict of the jury is for a less sum than the award, the plaintiff is not entitled to recover the costs accruing upon the appeal.

WRIT of error to the Court of Common Pleas of Lancaster county.

*John Shaeffer*, the plaintiff below, brought an action against *Abraham Landis*, the defendant, for erecting a dam on his own land, in consequence of which the waters of *Cocalico* creek were interrupted in their course, and thrown back on the land of the plaintiff. The action was referred to arbitrators, who awarded damages to the plaintiff in the sum of 400 dollars. The defendant appealed, and the cause having been tried in the Court of Common Pleas of Lancaster county, a verdict was given for the plaintiff, with six cents damages and six cents costs. A motion was made in the Court below, on the part of the defendant, that judgment be entered for the plaintiff without costs accruing since the appeal, on the ground, that as the verdict was for a less sum than the arbitrators awarded, he was not entitled to costs. But the Court overruled the motion, and entered judgment for full costs. This was the error complained of.

*Buchanan*, for the plaintiff in error, observed, that the rule the Court were about to establish was in the highest degree important, because it must be applied to cases of *contract* as well as *tort*. The common law allowed no costs, and the statutes giving them being penal in their nature are to receive a strict construction. 6 *Bac. Ab.* 390. *Stat.* 9. *Salk.* 205. *Cas. Temp. Hardw.* 357. The arbitration law of the 20th March, 1810, introduces a new system of costs which renders any argument deduced from the statute of *Gloucester* inapplicable. The 12th, 13th, and 14th sections(a) of that act establish a complete set of rules relative to costs on appeals, whether by plaintiff or defendant. If the appeal be entered by the defendant he is required by the 14th section to give security, that if the plaintiff in the event of the suit shall obtain a judgment for a sum equal to or greater, or a judgment

(a) 5 *Sm. L.* 135, 6.

as, or more, favourable than the report of the arbitrators, he shall pay all the costs that may accrue in consequence of the appeal. This language plainly indicates the intention of the legislature to have been, that the defendant should not pay such costs, if the plaintiff recovered less than was awarded by the arbitrators. The recognisance prescribes the limits within which the payment of costs is to be confined; for it would have been absurd not to make the security commensurate with the right intended to be secured. The act of assembly has followed the principle which has always prevailed in relation to the reversal of judgments, which is, that no costs are to be recovered on either side. A defendant, who upon an appeal obtains a verdict *more* favourable than the report of the arbitrators, reverses their judgment, and therefore is not liable to the costs which accrue upon the appeal. The case of *Lewis v. England*,<sup>(a)</sup> which settles the law on an act of assembly very similar to this, in which the recognisance of the defendant is to the same purport, must have great influence in the decision of this case.

1818.

*Lancaster.*


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 LEWIS  
 v.  
 SEANTER.

*Porter and Hopkins*, for the defendant in error, contended, that as the verdict of the jury as well as the award of the arbitrators had proved, that the plaintiff had a good cause of action, the rule which threw the costs upon the party who was in fault, authorised them to be recovered, in the present instance, of a defendant, who for a number of years had kept the plaintiff at law. The statute of *Gloucester*, 6 *Edw. 1. c. 1.* they said, gave costs in all cases in which damages were recovered, and unless it has been repealed by the arbitration law, it is in force here. On a writ of error, where the judgment is affirmed costs are recovered, though the rule of this Court is, that on the reversal of a judgment each party pays his own costs. Here the judgment of the arbitrators has been affirmed, so far at least as respects a cause of action, and to throw the costs of an appeal upon a plaintiff under such circumstances would operate very hardly upon him, and be productive of highly injurious consequences, for a defendant by lying by and not producing his evidence before the arbitrators, may be almost certain of procuring an abatement of damages. The 14th section of the arbitration law which directs the form of the recognisance, does not, it is true, mention this as

(a) 4 *Binn.* 5.

1818.  
*Lancaster.*  


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 LANDIS  
 v.  
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one of the cases in which the defendant shall pay costs; but it does not follow, that costs are not to be paid, because no security is ordered to be given for them. All that can be said is, that the recognisance is not co-extensive with the injury. The jury had unquestionably a right to give costs, and when they assessed them at six cents, they intended to give full costs. The case of *Lewis v. England*, was a decision on the law relative to justices of the peace, the proceedings before whom, form a separate system, and therefore it can throw no light on this question.

The opinion of the Court was delivered by

TILGHMAN C. J. Our legislature has introduced a new mode of trial. Either party may, in the first instance, carry the cause before arbitrators, and when they have decided, either party may appeal to the Court of Common Pleas, where there is a trial by jury, in the usual manner. The appeal is subject to certain conditions, one of which is, that the appellant shall enter into a recognisance, with sureties, for payment of the costs of the appeal, according to the regulations of the act of 20th March, 1810, 5 Sm. L. 181. In the 12th section of this act, it is enacted, that if the plaintiff be the appellant the condition of the recognisance shall be, "that if the said plaintiff shall not recover, in the event of the suit, a sum *greater*, or a judgment *more favourable* than the report of the arbitrators, he shall pay all costs that shall accrue in consequence of said appeal, and one dollar per day, for each and every day lost by the defendant, in attending on such appeal, which costs and daily pay shall be taxed and recovered, as costs in other cases are recovered." In the 11th section it is provided, that no appeal shall be allowed, until the appellant pay all the costs that may have accrued before the appeal, and the appellant shall not be permitted to produce as evidence in Court, any books, papers, or documents, which he shall have withheld from the arbitrators. The 13th section declares, that the costs paid by the appellant on entering his appeal, shall be taxed in his bill, and recovered of the adverse party, in such cases only, where, in the event of the suit, the appellant is entitled to costs agreeably to the provisions of that act. The 14th section is the one which bears on the point before us; it enacts, that if the defendant be the appellant, the condition of the recognisance shall be, "that

if the plaintiff in the event of the suit shall obtain a judgment for a sum *equal to, or greater, or a judgment as or* 1818.  
*more favourable* than the report of the arbitrators, the said defendant shall pay *all the costs that may accrue in consequence of said appeal*, together with the sum or value of the thing awarded by the arbitrators, with one dollar per day for each and every day that shall be lost by the plaintiff in attending to such appeal," &c. We have in these sections, a complete system of costs, of which the governing principle is, that the appellant shall pay costs unless he succeeds, at least partially, in the appeal. If the plaintiff appeals, he pays costs, unless he recovers *more* than the arbitrators gave him. If the defendant appeals, he pays costs, unless he obtains an *abatement* of what the arbitrators gave the plaintiff, because in both those cases it must be presumed, that there was no cause for the appeal. But, although the party who succeeds but partially in his appeal, ought not to *pay* costs, yet it does not follow that he ought to *recover* costs; because, although the event has proved, that the award of the arbitrators was wrong, yet that may have been the fault of the arbitrators, and not of the party in whose favour the award was made. In such cases, therefore, each party is left to pay his own costs. That is the principle which prevails in the common law courts; for, where a judgment of an inferior Court is *reversed* on a writ of error, the costs in error are not recovered by the party who obtains the reversal. But, where the judgment is *affirmed*, costs are recovered. On an appeal from arbitrators the law considers their report as *reversed*, where the judgment of the Court of Common Pleas is more favourable to the appellant than the report was. Indeed, it is a reversal strictly speaking; for the act of assembly makes the *report*, when filed in the office of the prothonotary, equal to a *judgment*, and it has been determined to be a judgment on which a writ of error lies. But it is argued for the plaintiff, that it is extremely hard he should not recover costs, when he has established his cause of action; and that he is entitled to costs, because the statute of *Gloucester* gives them, in all cases where damages are recovered, and the act of assembly has not repealed the statute. With the hardship of the case, the Court has nothing to do. But if the matter is fully considered, there are hardships on both sides; for the defendant may certainly complain of hardship, in being obliged to pay

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1818. costs, for appealing from a judgment which he has proved to have been wrong. The only question, however, is, what is the meaning of the act of assembly? Of its meaning I have no doubt. When it orders the appellants to give security to the adverse party, it must have been intended that security should be given for every thing which the adverse party could be entitled to recover. Now, so far as respects costs, the security is for the payment of costs, only in case the plaintiff shall obtain a judgment for a sum at least equal to the report of the arbitrators. To say, that the recognisance for payment of costs, was not intended to be co-extensive with the costs, would be to charge the legislature with an absurdity. Whatever inconveniences, therefore, may attend this construction, (and I am sensible, that an artful defendant, who lies by, and does not produce all his evidence before the arbitrators, may involve the plaintiff in great difficulty, particularly in actions of *tort*;) yet as the intention of the law is clear, we must not hesitate to adopt it. I am of opinion, that the plaintiff was not entitled to recover the costs of the appeal in this case, because the the verdict of the jury was for a less sum than the report of the arbitrators. The judgment should be reversed therefore, so far as respects the *costs*, and affirmed for the residue.

Judgment reversed, as respects the costs,  
and affirmed for the residue.

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### Case of the Road from *M<sup>c</sup>Claysburg*, &c.

*Monday,*  
*May 25.*

The Court will quash the proceeding in a road case where one of the original petitioners is appointed a reviewer.

ON the return of a *certiorari* to the Quarter Sessions of *Dauphin* county, in the case of a road leading from the upper end of Third street in *M<sup>c</sup>Claysburg*, to intersect the river road near *Christian Kunkle's* farm house, it appeared among other exceptions to the proceedings in the Court of Quarter Sessions, that *Nicholas Swoyer*, an original petitioner, had been appointed a reviewer, which *Elder* insisted was fatal to the proceedings, and cited the case of the *Radnor* and *Newtown Road*,<sup>(a)</sup> as decisive of the question.

(a) 5 Binn. 612.

*Irvine*, in support of the proceedings, contended, that as 1818.  
*Swoyer* was not a petitioner on the *last* petition, and the re- Lancaster.  
 port which was made on the petition signed by him had been  
 quashed, the exception did not fall within the rule establish- Case of the  
 ed by the case cited from 5 *Binn.* Road from  
 M'Claysburg,  
 &c.

But by THE COURT. It appearing that *Nicholas Swoyer*,  
 one of the last reviewers, was an original petitioner, we are  
 of opinion, that the proceedings should be quashed. The  
 case in 5 *Binn.* 612, settles the principle.

Proceedings quashed.

### STOEVER against LUDWIG et ux.

Friday,  
 May 29.

THIS was an appeal from a decree of the Register's The Register's  
 Court of the county of *Lebanon*, revoking letters of admini- Court have a right to  
 stration granted to *Adam Stoever*, jun. on the estate of *David* revoke letters  
*Stroh* deceased, and directing letters of administration to be of administra-  
 granted to *Christian Ludwig* and *Elizabeth* his wife; to tion granted  
 which *Wright*, for the appellant, excepted, to a person  
 not entitled to  
 them, and to  
 direct to  
 whom new  
 letters shall  
 issue.

1. Because the Register's Court had no jurisdiction of the matter.
  2. Because they refused an issue to try a matter of fact, though requested by the appellant.
  3. Because they had exceeded their jurisdiction in directing to whom letters of administration should issue.
- He referred to act of 30th *September*, 1791. 3 *Sm. L.* 58.  
 3 *Bac. Ab. Executors and Administrators*, F. 1 *P. Wms.* 40.  
 1 *Sm. L.* 42, note. 2 *Bl. Com.* 504.

*Godwin*, contra.

By THE COURT. We think the Register's Court did  
 right. It appears, that the deceased left no children, but a  
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1818. mother and a sister of the half-blood, the wife of *Adam Stoever*  
*Lancaster.* jun. In that case, the mother was next of kin, and exclu-  
 STOEVER sively entitled to the administration. The Register's Court  
 v. had a right to revoke the first letters and direct to whom the  
 LUDWIG *et ux.* new ones should issue.

Decree affirmed.

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SHAUFFLER *against* STOEVER administrator of STROH.

Friday,  
 May 29.

IN ERROR.

ERROR to the Common Pleas of *Lebanon* county.

A decree of the Register's Court revoking letters of administration and directing them to issue to another person, which decree has been appealed from by the administrator, does not, while the appeal is pending and undetermined in the Supreme Court, suspend his power to proceed in the recovery of debts due to his intestate.

In the Court below it was an action of debt brought by *Stoever* as administrator of *David Stroh*, which was submitted to arbitrators, who reported in favour of the defendant. The plaintiff appealed, and afterwards the defendant pleaded, that at the time of bringing the suit, the said administrator of the estate of *David Stroh* had been dismissed from his trust by the Register's Court of *Lebanon* county, and the letters of administration which he had surreptitiously and fraudulently obtained, revoked by the said Court, who had decreed, that new letters of administration should issue to *Elizabeth Ludwig* and *Christian* her husband, &c. To this plea the plaintiff replied, that he was administrator, &c.

The jury found a verdict for the plaintiff for 628 dollars.

On the trial, the Court charged the jury, that a decree of the Register's Court, revoking letters of administration and directing them to issue to another person, which decree had been appealed from by the administrator, did not, while the appeal was pending and undetermined in the Supreme Court, suspend his power to proceed in the recovery of the debts due to his intestate.

To this opinion a bill of exceptions was tendered and sealed, and *Godwin*, for the plaintiff in error, now contended, *Lancaster*. 1818.  
that it was erroneous.

SHAUFFLER

v.

*Wright*, for the defendant in error, cited 3 *Bac. Ab.* 50, 51. *STORVER*  
(*Wilson's* edit.) *Executors and Administrators*, 13. *Blackbo-* administrator  
*rough v. Davies.*(a) of *STON.*

By THE COURT. Pending the appeal, the letters of administration granted by the register were in force. Our opinion, therefore, is, that the charge of the Court of Common Pleas was right, and the judgment should be affirmed.

Judgment affirmed.

(a) 1 *Ld. Raym.* 684.

### LIGHTNER and others *against* WIKE.

#### IN ERROR.

May.

THIS case came before the Court on three bills of exceptions, which were returned with the record, on a writ of error to *Lancaster* county.

In the Court below, it was an action of ejectment brought by the plaintiffs in error against the defendant, in which the title of both parties depended on the validity of a writing, purporting to be the testament and last will of *George Wike*, deceased, the father of the defendant. The plaintiffs claimed in opposition to the will; the defendant under it. There

notes, cannot be received in evidence on a subsequent trial of the same cause, to prove what the witness testified.

The declarations of a person who is named an executor and devisee in a paper purporting to be a testament and last will, are not evidence in a suit to which he is not a party, depending on the validity of such paper as a will.

Where the defendant gave evidence to prove communications of a very confidential nature by a testator to a witness, it was held, that evidence of declarations by the testator, to another witness, tending to shew, that the first witness was not upon the terms of friendship and confidence with the testator which he pretended to be, was admissible.

The notes taken by counsel, of the testimony of a deceased witness, supported merely by his oath, that he believes that he took down what the witness said as it fell from him, but has no recollection of what he said, except from his

1818. had been a former trial on an issue of *devisavit vel non*, directed by the Register's Court, in which a certain *Anthony Ellmaker*, deceased, had been examined as a witness. *Charles Smith* Esq. one of the plaintiffs' counsel in this cause, had been counsel for the same parties, (who were defendants in the feigned issue,) and took notes of the testimony given by *Ellmaker*. He was sworn as a witness for the defendant on the trial in the Court below, and produced at the request of the defendant, his notes of *Ellmaker's* testimony. He swore, "that it was his usual practice, to take the substance and usually the words of a witness; that he believed he took down what *Ellmaker* said, as it fell from him; that he had no reason to doubt his having taken down his testimony as he delivered it; the substance of it; and that there had been no alteration of his notes since they were taken, but that he could not recollect a word the witness said, but from his notes; that he had no other recollection that he was even examined as a witness, than from what appeared on his notes." After this evidence had been given, the defendant's counsel offered Mr. *Smith's* notes in evidence. The Court admitted them, and the plaintiffs' counsel excepted to their opinion.

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*LIGHTNER*  
 and others  
 v.  
*WIKER.*

The plaintiffs in the course of the trial offered to prove declarations of a certain *Jacob Wike*, who was named an executor and devisee in the instrument, alleged to be the will of *George Wike*, but who was not a party to this suit, on the day after the decease of *George Wike*, that there was no will. This testimony was over-ruled by the Court, and formed the subject of the second bill of exceptions.

The contents of the third bill of exceptions are stated by the Chief Justice so fully, as to render it superfluous to do more than refer to that part of his opinion which relates to it.

The case was argued by *Buchanan* and *C. Smith*, for the plaintiffs in error, who cited, *Phill. Ev.* 199. *Miles v. O'Hara.*(a) *Peake's Ev.* 190. *Lessee of Glymer v. Littler.*(b) and by

(a) 4 Binn. 108.

(b) 3 Burr. 1244.

*Montgomery and Hopkins*, for the defendant in error, who referred to *Phill. Ev.* 71. 211. *Longenecker v. Hyde.*(a) *Bull. Lancaster. N. P.* 296. *Stout v. Russell.*(b) 1818.

LIGHTNER  
and others  
v.  
WICK.

The opinion of the Court was delivered by

TILGHMAN C. J. It is a rule of law, that what a deceased witness swore at a former trial, may be given in evidence at a subsequent trial of a cause depending between the same parties. This is from necessity. It is an exception from the general rule, which demands the examination of a witness *viva voce*, and must be extended no further than necessity requires. The deceased witness cannot be examined; therefore a living witness is permitted to prove what the deceased had said. But this proof must be on oath, because there is no necessity that it should be otherwise. Mr. *Smith*, therefore, might have been permitted to declare upon his oath, and not otherwise, what *Ellmaker* had sworn on the former trial. But he could not undertake to prove this upon his oath, and therefore it was endeavoured to supply the defect of oath, by his notes; these notes have no character recognised by the law; they are no more than a private memorandum, by which the witness would have been permitted to refresh his memory; but when refreshed, he must swear from his own memory, and not from his notes. This Mr. *Smith* was so far from being able to do, that he declared he had no recollection of *Ellmaker's* testimony, even after he had read his notes. The notes, therefore, could not be admitted as evidence, without violating the principles of the law. It would be evidence of the most dangerous nature. Mr. *Smith* is known to be a man of remarkable accuracy. But others who take notes, may be of a different character. In general, the taker of notes condenses the words of the witness into what he supposes to be the substance. But the partiality of counsel inclines them to view every thing in a light favourable to their cause; and during the trial, their ideas pass through a medium, which diverts them from the right line; of this, I presume Mr. *Smith* was sensible, and therefore he would not undertake to swear, that his notes contained the exact testimony of *Ell-*

(a) 6 *Blin.* 1.

(b) 2 *Yeates*, 334.

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*maker*. It would be most extraordinary then, if the Court should give more credit to his notes, than he gave to them himself. In short, it appears to me, that to suffer such a writing to go to the jury, would be to admit evidence *without oath*, of what *Ellmaker* had sworn. The case of *Miles v. O'Hara*, was cited for the plaintiff. All that was decided in that case was, that the notes of Judge YEATES, unsupported by his oath, were not evidence ; but what testimony would have been required of the Judge, in order to make his notes evidence, was not a question before the Court, and consequently was not decided.

2. The second bill of exceptions in this case, was taken because the Court refused to admit evidence, offered by the plaintiff, of the *declaration* of a certain *Jacob Wike*, (named an executor and devisee in the writing set up as the will of *George Wike* deceased,) made after the death of the said *George Wike*, that he had left no will. *Jacob Wike* was no party to this suit, nor could the verdict be given in evidence, for or against him ; he was a competent witness. Clearly, therefore, his *declarations* were not evidence. They do not fall within the reason of *confessions* by a party to the suit.

3. A third bill of exceptions was taken by the plaintiff. After the defendant had given in evidence, the deposition of *Leonard Ellmaker* deceased, in which the said *Ellmaker* swore to a confidential communication made to him by old *George Wike*, and also swore, that he and the said *Wike* had been long in the most intimate and unreserved friendship ; the plaintiff offered to prove, by the deposition of *Christian Smoker*, that in a conversation with the said *Wike*, the supposed testator, he asked him, "where he got his grinding done ; he answered, at *Henderson's* mill ; the deponent then asked him, whether he did not grind at *Ellmaker's* mill ; he answered, that he had need enough of his own grain ; that he had his grinding done at *Rine's* mill, and *Hesse's* mill." This evidence was objected to by the defendant, and rejected by the Court. Of what importance the jury might have thought it, I know not, but the evidence should have gone to them ; because it went in some degree to contradict the assertion of *Ellmaker*, that he was the intimate and confidential friend of *George Wike*, and to shew the improbability of *Wike's* having intrusted to *Ellmaker*, family concerns of a

very delicate nature. It is not hearsay evidence, but matter of fact, tending to rebut other evidence of a similar nature which had been given by the defendant. It was not offered to discredit *directly* the character of *Ellmaker*, but to shew, that what he had sworn was not the truth, because inconsistent with other facts. It was, therefore, legal evidence.

My opinion, upon the whole, is, that the judgment should be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

# 1 GALBRAITH and others *against* BLACK.

## IN ERROR.

May.

THIS was an ejectment brought in the Court of Common Pleas of Dauphin county, by *James Black*, the defendant in error, against *Joseph Galbraith and others*, heirs of one *Bartram Galbraith*, to recover a tract of land in their possession.

To establish his title, the plaintiff gave in evidence a warrant to himself, dated the 27th *November*, 1801, for 400 acres, including his improvement; interest to commence *May* 1st, 1772; a receipt bearing the same date for the purchase money, amounting to forty pounds; a survey of 439 acres on the 14th *December*, 1801, and a decision of the board of property in his favour, on the 10th *April*, 1802, on a *caveat* entered by *Bartram Galbraith*, on the 24th *December*, 1801.

The defendants then offered the deposition of one *John*

tract of land for his own use and benefit, his title is the same as if he had been of age when he commenced his improvement.

Where a Judge has expressed himself in such a manner as to be understood by the jury, this Court will not reverse the judgment on critical objections to his language.

The record of proceedings before two justices and twelve freeholders under the landlord and tenant law, is not conclusive evidence of the facts found by their inquiry; but the truth of them may be traversed in an ejectment brought by the tenant to try the title.

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The Court are not bound to instruct the jury to find for either party on the whole evidence. It is merely their duty to inform them as to the law, leaving the decision of the facts entirely to them. The general rule is, that the labour of a minor son will enure to the use of the father, but if the father permit his son to improve and settle on a



1818. *Hatfield*, filed of record in the office of the secretary of the land office, and at the same time offered to prove, that *Hatfield* had long since been dead. This testimony was objected to by the plaintiff's counsel, and over-ruled by the Court. The defendants also offered in evidence a patent, bearing date *April 7th*, 1810, granted to *Jacob Baker*, upon a warrant to *James Eagan*, dated *December 2d*, 1774, which, on being objected to, was likewise rejected by the Court, who sealed a bill of exceptions on both points. Neither of these papers, however, came up with the record.

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\* The title upon which the defendants relied, was a warrant to *Bartram Galbraith* for 300 acres, dated *December 2d*, 1774; a warrant bearing the same date, and for the same quantity of land, to *James Eagan*; a survey on *Eagan's* warrant of 498 acres 42 perches, on *February 20th*, 1775; a deed from *Eagan* to *Bartram Galbraith*, dated *December 30th*, 1774; a lease from *Galbraith* to *Thomas Black*, the father of the plaintiff, dated *March 29th*, 1782, demising the land for the improvement of the estate, and payment of the taxes from year to year, at the will of the lessor, and the record of a proceeding under the landlord and tenant law, commenced on the *26th April*, 1802, by *Bartram Galbraith*, landlord, against *James Black*, son and heir of *Thomas Black*, tenant, finding, that on the *29th March*, 1782, *Bartram Galbraith* possessed, and on the same day demised, the premises to *Thomas Black*, to hold on the terms above stated, and that *Thomas Black* died, and his son *James* entered and held the premises until the *29th March*, 1801, as tenant on the same terms as his father.

The plaintiffs' counsel then offered to prove, that *James Black* was residing on the lands in dispute, before the date of *Galbraith's* and *Eagan's* warrants; that when *Galbraith* attempted to make a survey, he was opposed, after he had run one or two lines, by *James Black*, and desisted from the attempt, and that *James Black* continued to reside on the said land and improvement from *May*, 1771, making large and valuable improvements, unforbidden by *Galbraith*, and having no knowledge during that time of any lease to *Thomas Black*, or of any pretence of his being continued as the tenant of *Galbraith* on the land in dispute. This evidence was objected to by the defendant's counsel, but the Court admitted it, and sealed a bill of exceptions.

When about to charge the jury, the Court were requested 1818.  
by the counsel for the defendants to instruct them on ten *Lancaster.*  
points which were stated. The second, third, fourth, sixth, *GALBRAITH*  
seventh, eighth and ninth points were embraced by the first, *and others*  
the substance of which was, that as the plaintiff claimed *v.*  
the land under a settlement made by his father, who, in 1782, *BLACK.*  
became the tenant of *Bartram Galbraith*, and as he continued  
from the time of his father's death to reside thereon, under  
the said lease, until the premises were recovered in 1802,  
under the landlord and tenant law, he was not entitled to re-  
cover. The Court affirmed the law involved in these posi-  
tions, but gave no opinion as to the facts, leaving it entirely  
to the jury to decide whether or not the plaintiff resided on  
the land in the character of tenant.

The fifth point on which the Court was requested to charge  
was, that the record of the proceedings under the landlord  
and tenant law, was final and conclusive as to all the facts  
therein decided. The charge of the Court was, that although  
the record was evidence of those facts, it was not conclusive,  
and it was competent to the plaintiff, notwithstanding, to  
shew, that he settled and improved the land, held possession  
of it, and extended his improvements in his own right, in  
pursuance of his own improvement and settlement, and not  
under his father or *Bartram Galbraith*.

On the tenth point, which was, that the labour of a son  
under twenty-one years of age, will enure to the use of the  
father, the Court instructed the jury, that if a father permits  
a minor son to work for his own use and benefit, and the son  
accordingly improves and settles on a tract of land, his title  
is the same as if he were of age at the time of improving,  
settling, &c.

The opinion of the Court on these points was filed at the  
request of the defendant's counsel, and together with the  
bills of exceptions above-mentioned, was returned with the  
record into this Court, where the questions arising out of  
them were argued by

*Elder and Hopkins*, for the plaintiffs in error, who cited  
*Boggs v. Black*.(a) *Phill. Ev.* 218, 219. 222, 223. 226, 227.  
234. 242. 254. 259. 262. 3 *Bl. Com.* 24. *Moses v. M'Fer-*

(a) 1 *Binn.* 333.

1818. *lan.*(a) Act of 26th March, 1785.(b) Act of 21st March, 1772, sect. 12.(c) *Jackson v. Harder*.(d) *Galloway v. Ogle*.(e) *Hallon v. Earl of Thanet*.(f) *Cosby v. Brown*.(g) *Richardson v. Stewart*.(h)

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*Fisher and Montgomery*, for the defendant in error, cited, *Rawlyn's case*.(i) *Co. Litt. 48. a. Messinger v. Kintner*.(j) *Snyder v. Snyder*.(k) *Ferrer's case*.(l) *Kitchen v. Campbell*.(m) *Phill. Ev. 222. 236. 248. Ryer v. Atwater*.(n) *Manny v. Harris*.(o) 5 *Bac. 428*.

TILGHMAN C. J. delivered the opinion of himself and GIBSON J.; DUNCAN J. having been concerned in the case as counsel, did not sit.

On the trial of this cause in the Court of Common Pleas of *Dauphin* county, the Court rejected the deposition of *John Hatfield*, and a patent to *Jacob Baker*, offered in evidence by the defendants, on which an exception was taken to their opinion, but the papers rejected have not come up with the record. In this situation we can form no judgment. I shall, therefore, say nothing as to that exception. But there are other exceptions, concerning which, enough appears on the record, to enable us to decide. After the evidence on both sides was closed, the counsel for the defendants requested the Court to instruct the jury on ten points, which are stated. On the 1st, 2d, 3d, 4th, 6th, 7th, 8th, and 9th, points, the Court directed the jury in the manner requested by the defendants' counsel, provided the jury should agree with the counsel, in opinion, as to the facts, but the decision of these facts was left to the jury. Of course the law was to depend on the fact. The Court have certainly a right to direct in this manner, and it is most prudent to do so, for the facts cannot be withdrawn from the jury. The defendant's counsel complain, that the jury were not directed to find for

- (a) 2 *Burr. 1009*.
- (b) *Purd. Dig. 421*.
- (c) *Purd. Dig. 580*.
- (d) 4 *Johns. Rep. 302. 210*.
- (e) 2 *Binn. 468*.
- (f) 2 *Bl. Rep. 1159*.
- (g) 2 *Binn. 124*.
- (h) 4 *Binn. 198*.

- (i) 4 *Co. 54. b*.
- (j) 4 *Binn. 97*.
- (k) 6 *Binn. 490*.
- (l) 6 *Co. 7*.
- (m) 3 *Wils. 308*.
- (n) 4 *Day. 431*.
- (o) 2 *Johns. Rep. 24*.

the defendant on the evidence ; but I think they complain without cause ; for, however strong the evidence may be on one side, it is not for the Court to decide it, and they discharge their duty when they instruct the jury as to the law, leaving the facts to them. The 10th point proposed to the Court was, that the labour of the son of *Thomas Black*, being an infant, enured to the use of his father. Instead of laying down this broad position, the Court told the jury, "that if a father permits his minor son to work for himself, for his own use and benefit, and the son, accordingly, improves and settles on a tract of land, his title is the same as if he was of age at the time of improving, settling," &c. This is all very correct. And, although it was not expressly said, that if the father did not give such permission, the labour of his son should enure to his (*the father's*) use, yet the meaning of the Court is sufficiently apparent. The general rule is, that the work of the son, is for the use of the father, and the case put by the Court, is an exception to the rule. I think the charge could not have been misapprehended by the jury, and a judgment should not be reversed on such critical objections to the language of the Judge. But the point of greatest difficulty was the 5th, and on that the Court gave a decided opinion, which was the subject of a special exception. The defendant had given in evidence, the record of certain proceedings under the landlord and tenant act, whereby it was found by twelve freeholders, assisted by two justices, that the plaintiff had held the land in contest for a certain period, under a lease from *Bartram Galbraith* deceased. In opposition to this verdict, the plaintiff offered to prove, that he held and made valuable improvements on this land, in his own right, and not under a lease from the said *Bartram Galbraith*. The defendants objected to the evidence, and contended, that the plaintiff was estopped by the inquisition. But the Court were of a different opinion, and admitted the evidence, directing the jury, that the record of the proceedings before the justices, was *legal*, but *not conclusive* evidence for the defendants.

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heard, yet it cannot be supposed, that the matter in dispute can be decided in a manner as satisfactory as in a Court of justice. If the landlord obtains his possession, the object of the law is answered, and it does not appear, that justice would be promoted, by extending the efficacy of the proceedings any further. Should an action afterwards be brought by the tenant to try the title, the truth might be better ascertained, by the evidence produced on the trial, without considering the tenant as estopped by the proceedings before the justices. But it is insisted on, by the counsel for the defendants, that a matter which has been once tried and decided, shall not be controverted again between the same parties. That the rule is such, when trials are had in the regular courts of justice, is not to be denied. But it would be going too far, to extend it universally to summary proceedings. On a *feri facias* and *scire facias* against an executor, although it be found by the jury, that the executor hath committed a *devastavit*, yet this finding may be traversed. And in general, inquests of office are traversable. But this is not an inquest of office; the proceedings are at the instance of the landlord, and the tenant is summoned. If the act of assembly had directed, that an issue should be joined between the parties, and that the verdict should be conclusive, I should have thought, that it could never afterwards be controverted between those parties. But the proceedings are not so. If the jury find the allegations of the landlord to be true, *viz.* that the lease was made, that it is fully ended, and that demand was made of the tenant to leave the premises, three months before the landlord's application to the justices, then the justices are to make a record of such finding, &c. But, suppose the jury do not find these things, what is to be done? No record is directed to be made in such cases, and consequently no judgment is given for the tenant, nor can he in any subsequent proceedings, avail himself of the opinion of the jury. According to the construction then contended for by the defendants, the act of assembly would work very unequally, and to the manifest injury of the tenant. If the landlord obtains a verdict, he not only gets the possession, but in an action brought afterwards to try the title, the tenant is estopped; he can deny no fact found by the jury; but if the opinion of the jury should be in favour of the tenant, the landlord is not estopped, and the tenant has no other advan-

tage than the retaining of the possession. This is a very strong circumstance, distinguishing the present case from those in which the parties are for ever concluded by a verdict on the same point; and quite sufficient in my opinion to form an exception from the general rule. I am for giving the act of assembly complete operation to effect its purpose; the restitution of possession to the landlord. But there I would stop. The end of the law is answered, and it would be inconvenient to carry it farther. I am, therefore, of opinion, that the Court of Common Pleas decided rightly, and their judgment should be affirmed.

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Judgment affirmed.

**BROWN** and others *against* **FURER** executrix, &c.

IN ERROR.

Wednesday,  
May 20.

WRIT of error to the Court of Common Pleas of *Dauphin* county.

An action to recover a legacy charged upon real estate cannot be supported against the devisee and terre-tenants of the land without an express promise to pay it.

It seems, that the action should be brought against the executor and terre-tenants; and the judgment should be so entered as to charge the land only and not the persons of the defendants.

In the Court below it was an action of debt brought to *May* Term, 1807, by *Agnes Furer*, executrix and residuary legatee of *Agnes Brown*, to recover a legacy of one hundred pounds bequeathed by one *Daniel Brown*, to her testatrix, and charged upon a tract of land, of which one of the defendants was devisee and the rest terre-tenants.

The declaration set forth, that *Daniel Brown* being seised of a certain tract of land, (describing it,) on the 15th day of *January*, 1780, made his testament and last will, by which he devised the said tract of land to his son *John*, charged with the payment of one hundred pounds to his mother, the wife of the testator; that *John Brown* accepted the lands so devised to him, and entered and took possession of the same, and afterwards, to wit, on the 23d *February*, 1791, conveyed them to a certain *Peter Ebersole*, in fee simple, who entered and took possession thereof, and continued in possession until the day, &c. when he died, leaving *Elizabeth Ebersole*,

1818. *who intermarried with Michael Cassel, John Ebersole, Christina Ebersole, who intermarried with John Smith, Barbara Ebersole and Catherine Ebersole, his children and heirs at law, and Barbara Ebersole his widow, who entered and took possession of the said lands and tenements, and continued in possession thereof until the impetration of the writ in this case; the said legacy and every part thereof being unpaid. The declaration then stated, that Agnes Brown, on the 16th January, 1803, made her testament and last will, and set out that part of it which bequeathed the legacy in question to her daughter, Agnes Furer, the present plaintiff, and made her the residuary legatee, and sole executrix of her will. It then concluded in the common form.*

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The defendants pleaded in abatement, that another suit was depending for the same cause in the Circuit Court of Dauphin county, to March Term, 1804, to which the plaintiff replied, that that suit was abated by the death of *Agnes Brown* and *Peter Ebersole*, and that the present action was brought by the legal representative of *Agnes Brown*. To this replication the defendants demurred, and on motion of the plaintiff's counsel, the Court dismissed the plea in abatement, because it was not verified by affidavit.

The defendants then pleaded *non debent*, and payment with leave, &c. on which issues were joined, and the cause was tried on the 15th December, 1815, when a verdict was found for the plaintiff.

On the trial, the defendant's counsel requested the Court to charge the jury on five points, which they stated. The charge was against the defendants on the first four points, and the last the Court declared to be immaterial in the cause.

1. That an action of debt, being a personal action, will not lie against a devisee of land charged with the payment of a legacy, the suit being sustainable against the executors only, under the act of assembly.

2. That such suit will not lie against terre-tenants.

3. That if it could be sustained against the devisee, it could only be sustained during his ownership of the land, and that a sale and delivery of possession of the land would be a bar to such a suit.

4. That the plaintiff having sued all the defendants, except

*John Brown*, as the widow, children, and heirs at law, of 1818.  
*Peter Ebersole*, and averred their entry and continuance in Lancaster.  
 possession to the commencement of this suit as such, she  
 could neither claim nor give evidence against them in any  
 other character and as five of the defendants, are the grand-  
 children, and not the children of *Peter Ebersole*, the plaintiff  
 could not recover.

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The charge of the Court on these points, and their order  
 to strike off the plea in abatement, were now contended to be  
 erroneous by *Elder* and *Hopkins*, who relied upon the act of  
 21st March, 1806. (a) *Travers v. Buckley*. (b) 1 Com. Dig. 2.  
*Abatement*, C. 1. 29th Rule of Common Pleas. Act of 13th  
 April, 1791. (c) Act of 21st March, 1772. (d) *Livingston v.*  
*Livingston*. (e) *Beecker v. Beecker*. (f) *Jefferson v. Morton*. (g)  
*Livingston's exr's v. Tremper*. (h) *Gilb. Hist. of C. P.* 255.  
*Jackson v. Shaffer*. (i) 1 *Crompt. Pr.* 134.

*Godwin* and *Duncan*, for the defendant in error, cited *Pas-*  
*chal v. Keterich*. (j) 3 Com. Dig. Debt, A. *Ewer v. Jones*. (k)  
*Short v. Coffin*. (l) *Rapp v. Elliott*. (m) 1 Com. Dig. 39. *Abate-*  
*ment*, H. 1. *Douglas v. Beam*. (n) 1 *Crompt. Pr.* 136. *Nichols v.*  
*Postlethwaite*. (o) *Phelps v. Holker*. (p) *Vass v. Smith*. (q)  
 Act of 4th April, 1798. (r) 8 Co. 162. *Black v. Wistar*. (s)  
*Thompson v. Musser*. (t) *Tuttle v. Love*. (u)

The opinion of the Court was delivered by

TILGHMAN C. J. *Daniel Brown* deceased, devised a tract  
 of land of which he died seised, to his son *John Brown*, one  
 of the defendants in fee, charged with a legacy of 100*l.* be-  
 queathed by the testator to his wife *Agnes*, who died without  
 having received the said legacy, having made her last will  
 and testament, and constituted *Agnes Furer*, the plaintiff, the

(a) 4 Sm. L. 330.

(b) 1 Ves. 386.

(c) 3 Sm. L. 30.

(d) 1 Sm. L. 383.

(e) 3 Johns. Rep. 189.

(f) 7 Johns. Rep. 105.

(g) 2 Saund. 7. note 9.

(h) 11 Johns. 101.

(i) 11 Johns. 513.

(j) 2 Day. 151.

(k) 2 Ld. Ray. 237. 6 Mod. 27. S. C.

(l) 5 Burr. 2730.

(m) 2 Dall. 184.

(n) 2 Binn. 78.

(o) 2 Dall. 131.

(p) 1 Dall. 261.

(q) 6 Cranch, 226.

(r) 3 Sm. L. 331.

(s) 4 Dall. 267.

(t) 1 Dall. 458.

(u) 7 Johns. 470.



1818. *executrix thereof. John Brown, after the death of his father Daniel, entered into the land devised to him, and conveyed the same to Peter Ebersole deceased. Peter Ebersole died seised of the said land, leaving Elizabeth Ebersole, (married to Michael Cassel, one of the defendants,) John Ebersole, Christina Ebersole, (married to John Smith, another of the defendants,) Barbara Ebersole, and Catherine Ebersole, his children and heirs, and Barbara Ebersole his widow, all of whom, after the death of the said Peter Ebersole, entered into the said tract of land, and became seised thereof. This action was brought, for the recovery of the said legacy of 100*l.* by Agnes Furer, the executrix and residuary legatee of Agnes Brown, against John Brown the devisee of the said land, and the widow and children of Peter Ebersole, who purchased it of the said John Brown, in the Court of Common Pleas of Dauphin county, and judgment was rendered for the plaintiff against all the defendants jointly. This judgment may be executed not only on the land charged with the legacy, but operates equally and personally on all the defendants. Their property of every kind, may be levied on; their bodies may be imprisoned. It violates the principles of law and equity. Neither John Brown the devisee, nor any of the other defendants ever made a promise to pay the legacy. There is no reason, therefore, why they should be personally liable to the payment. The land is the fund to be looked to, in whatever hands it may be. A legacy charged on land, is a good consideration to support an assumption to pay it, by the devisee, or terre-tenant. But, where there is no express assumption, there is no personal obligation to pay. This distinction was taken by the Supreme Court of New York, in the cases of *Livingston v. Livingston's exr's*. 3 Johns. 189, and *Beecker v. Beecker*, 7 Johns. 99. But suppose there is no assumption, how is the legatee to recover? In those states which have courts of chancery, there is no difficulty. On a bill filed by the legatee, there will be a decree for the sale of the land. But we have no court of chancery. It is necessary, therefore, that remedy should be had in the courts of common law. There was a period, when in England, legacies were recovered in the common law courts. During the time of the Commonwealth, the ecclesiastical courts were abolished, and chancery had not then taken jurisdiction in cases of legacy. I believe, Lord NOTTINGHAM*

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was the first chancellor, who assumed that jurisdiction. To prevent a failure of justice, therefore, the common law courts permitted suits for the recovery of legacies. This appears in the case of *Nicholson v. Shirman*, 1 *Sid.* 45, and *T. Ray*. 23. Lord Holt, indeed, is reported to have said, in the case of *Ewer v. Jones*, 2 *Ld. Raym.* 987, that a legatee might maintain an action of debt against the terre-tenant, for a legacy charged on land. But we have no record of any judgment at common law for a legacy, since the time of the Commonwealth. It sufficiently appears, however, that the English courts of common law, have, in cases of necessity, taken jurisdiction in matters of legacy. And upon the same principle, our Courts ought to assume the same jurisdiction. Where there is a right, we must not suffer it to be said, that there is no remedy. Now the remedy, where there is no express promise to pay, should be against the fund which the testator has designated; this is agreeable to reason and justice. The only question then is, against whom shall the action be brought. This case does not fall within the provisions of our act for the recovery of legacies. In order to do complete justice, it would seem right, that the terre-tenants should be called on, because they have the immediate interest in the land. There is great reason also, for including the executor, in the action, because, by our law, all the lands are liable to the payment of the testator's debts, and may be taken in execution on a judgment against the executor. It is proper, therefore, to afford the executor an opportunity of shewing, that the land is not more than sufficient to discharge the debts, in which case the legacy must fall. One of the plaintiff's counsel cited a precedent, from a manuscript book of entries of the late Judge YEATES, of a declaration in debt, for the recovery of a legacy charged on land, against the executors and terre-tenants, in the case of *Patton v. Mc Cawley's exr's*. in the year 1782, in Lancaster county. This declaration appears to have been drawn by Mr. Edward Burd, the late prothonotary of this Court, who, I know, had access to the book of precedents of the late C. J. SHIPPEN. Mr. SHIPPEN had been long prothonotary of this Court; and had copied the precedents in the book of his father-in-law, *Tench Francis*, who, about the middle of the last century, was the attorney-general of *Pennsylvania*; so that we have great reason to suppose, this form of action may have been devised

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in early times. I know of no other form, better calculated to do justice, always remembering, that judgment is to be entered, so as to charge the *land*, and *not the persons*, of the defendants. Without absolutely committing myself, therefore, on the opinion now thrown out, as to the form of action, I may say, that according to my present ideas, the proper parties to be made defendants, are, the executor and terre-tenants. But I am clearly opinion, that judgment rendered in this action was erroneous, and should be reversed.

Judgment reversed.

Wednesday,  
 May 30.

### The Commonwealth against HAMBRIGHT.

A negro, or mulatto servant, who binds himself in another state, to serve his master until the age of 28 years in consideration of manumission, and is brought into Pennsylvania to reside, cannot be removed out of the state without his consent; although the indenture contain a covenant to serve his master in Pennsylvania or any other state; such a covenant is void. Nor can his master imprison him, in order to compel his consent.

*A HABEAS CORPUS* having issued to the defendant, who was jailor of *Lancaster*, to bring up the body of negro *Tom*, he returned, that he held him as the agent of *Isaac Law* his master, by virtue of an indenture made the 27th August, 1805.

This indenture recited, that *Law* had manumitted *Tom*, whom he held as a slave in the state of *New Jersey*, and who was twelve years old in *February*, 1805; and that in consideration of manumission, *Tom* had, with the approbation of two justices of the peace of *Somerset county, New Jersey*, (he having no parents in that state to consent to the binding or removal into *Pennsylvania*,) bound himself to *Law* to learn the occupation of a husbandman, and to dwell with and serve him from the date of the indenture, until the 4th *February*, 1821, in the state of *Pennsylvania*, or in any other state in which *Law* might reside.

It was agreed, that *Tom* was sent to prison by his master, with an intent to keep him there until he should consent to go with him to the state of *New Jersey*, where he intended to reside.

*Hopkins*, for the negro, contended, that there was no law authorising the master to imprison his apprentice after the age of twenty-one years, nor to carry him out of the state without his consent. The language of the 3d section of the

act of 29th March, 1788,(a) is perfectly plain, and positively prohibits the removal of any negro or mulatto slave or servant for a term of years, except in certain specified cases, out of this state, with an intention to change their place of abode or residence. Whether the indenture was made in or out of the state is immaterial, because the law which permits negroes and mulattoes to be bound until the age of twenty-eight years, declares in express terms, that none shall be held to serve beyond that period by virtue of any indenture whatsoever, and declares in terms equally comprehensive and express, that no persons of this description, shall be taken out of this state against their consent. If a construction be given to the law which authorises the master to carry his servant into *New Jersey*, he is equally authorised to carry him to *Georgia* or *New Orleans*, and thus entirely to defeat the object of the legislature. In this case, the master can complain of no hardship, because the indenture was made with express reference to *Pennsylvania*, with the laws of which he must be supposed to have been acquainted, when he entered into the contract. It requires no argument to shew, that if the master cannot take away his servant without his consent, he cannot imprison him for the purpose of forcing him to consent.

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*Buchanan*, for the master, answered, that slaves had derived great advantage from the decision of this Court,(b) that they might be bound out of this state, and brought into it, and compelled to serve until twenty-eight years of age; and many had received freedom in consequence of it; but if masters for such breaches of the indenture as this, are put to an action of covenant, the humane views of the legislature, will be counteracted, by such an obstacle being thrown in the way of manumission. The case of negro *Tom* does not come within the 3d section of act of 29th March, 1788. By the indenture into which he entered, in consideration of the highest benefit that could be conferred upon him, he expressly agreed to serve his master in *Pennsylvania*, or in any other state in which he should reside, and it surely never could have been intended to put it in the power of a slave, who had received his freedom in another state, in consequence of an agreement to serve his master for a limited term, to violate the express stipulations of his contract. If an inhabitant of *New*

(a) *Purd. Dig.* 490.

(b) *Resp v. Gaoler of Phil.* 1 *Yeates*, 368.

1818. *Jersey* should bring into this state a servant bound to serve until the age of twenty-eight years, the doctrine now contended for, would deny him the privilege, after a short residence here, of carrying him back, which would be great injustice. The case of *The Commonwealth v. Edwards*,<sup>(a)</sup> has decided, that a master cannot remove his apprentice out of the state in which the indenture was executed, unless the indenture give him such power. The necessary inference is, that if the indenture contain such a power he may do so. The leading object of the legislature in the enactment of the abolition act of 1st March, 1780, was to secure the freedom of persons born within the state, who otherwise would have been slaves. This is manifest from the 3d section of that act. It is evident, it was not intended to put servants born within the state, who were by that law bound to serve till twenty-eight years of age, on the same footing with those introduced from other states; for the 4th section secures to the first the same freedom dues, and privileges, which attached to servants who were bound to serve for four years prior to that act; but no provision of that kind is made in favour of servants bound for the same period; and brought from other states; which affords an inference, that the termination of their period of service out of the state, was contemplated in some instances, and that they were not viewed in the same light.

The opinion of the Court was delivered by  
 TILGHMAN C. J. Negro *Tom*, being a slave resident in the state of *New Jersey*, was purchased by *Isaac Law*, of *Lancaster* county in *Pennsylvania*, and manumitted at the age of 12 years, in consideration of which the said *Tom* bound himself to the said *Isaac Law*, with the approbation of two justices of the peace of *New Jersey*, (having no parents living there,) as an apprentice to learn the occupation of an husbandman, and to serve the said *Isaac Law*, or his assigns, either in *Pennsylvania* or any other state, until the 4th February, 1821, at which time the said *Tom* will be of the age of 28 years. Such an indenture, between freemen, could hardly be supported, because it would not be for the benefit of the infant; but it is very much for the benefit of an infant slave, who receives from his master,

(a) 6 Binn, 202.

the most valuable of all considerations, *freedom*, and therefore ought to be supported. Accordingly we find, that in our act for the gradual abolition of slavery, sections 12 and 13, such contracts are expressly recognised. Covenants of personal servitude or apprenticeship between negroes or mulattoes under the age of 21, and their masters, are permitted, provided, that the servitude shall not continue longer than the age of 28 years. The same act authorises servitude till the age of 28, in the case of children of slaves who received freedom by virtue of that act. But it was found, that this temporary servitude was sometimes productive of great oppression; the servants being removed from the state of *Pennsylvania* to other states, where the laws did not afford them equal protection. In order to prevent this mischief, it was enacted, by the act of 29th March, 1788, sect. 3, that no negro or mulatto servant for a term of years, shall be removed out of the state with the design, that the place of abode or residence of such servant shall thereby be altered, without his consent, if of full age, testified upon a private examination before two justices of the peace of the city or county in which he shall reside, or if under full age, without his consent testified as aforesaid, and also the consent of his parents, if he have any, testified in manner aforesaid, of which the said justices, or one of them, shall make a record, &c.

The meaning of this act is too clearly expressed, to admit of a doubt. It extends to all negro or mulatto servants for years, whether bound within the state or without. Whoever brings a servant of that kind within this state, for the purpose of permanent residence, is bound by the law, and any covenant in the indenture, contrary to the law, must be considered as void. Now it appears, by the confession of *Isaac Law*, that *Tom* is imprisoned by his order, and that he intends to continue the imprisonment until *Tom* shall consent to go with him to the state of *New Jersey*, to which he is about to remove for the purpose of residing there. To carry the negro there, against his consent, is directly contrary to law, and to imprison him for the purpose of compelling his assent, is equally unlawful. I am, therefore, of opinion, that *Tom* should be discharged from prison, and delivered to his master, who must take care to make no attempt to carry him out of the state, against his consent.

Prisoner discharged.

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Lancaster.**LONG against BAILIE indorsee of BUCHANNAN.***Wednesday,*  
May 20.

IN ERROR.

It is no objection to the competency of a witness, that he believes himself interested in the event of the suit, when in fact he is not so.

Nor will an honorary engagement which cannot be enforced at law, exclude his testimony.

A witness cannot deprive a suitor of his testimony by becoming interested for the purpose of rendering himself incompetent.

ON the trial of this cause, which was an action on a promissory note, brought by *Samuel Bailie*, indorsee of *Thomas R. Buchanan*, against *Benjamin Long*, the drawer, in the Common Pleas of *Lancaster* county; the indorser, *Buchanan*, was called as a witness by the defendant, and objected to by the plaintiff's counsel, because he was interested in the event of the suit. On his examination on the *voir dire*, it appeared, that five or six weeks before the trial, *Bailie*, the plaintiff, had executed to him a release of all right of action founded upon his indorsement. On the morning of the trial, just before the subpoena was served upon him, the release was destroyed by his consent in the presence of the plaintiff's counsel, and he "expected it was because he was called forward as a witness, that the release was destroyed." He stated, that he considered himself interested in the cause, and bound to pay the money if *Long* could not be compelled to pay it, and added, that he was unwilling to be examined.

The Court refused to permit the witness to be sworn in chief, and the defendant excepted to their decision.

In his charge to the jury, the President of the Court of Common Pleas declared, that a note of this kind might be transferred by a blank indorsement by the payee; that such an indorsement was a sufficient authority to any person who honestly and fairly obtained possession of the note, to demand the contents of the drawer in his own name as indorsee, and that the possession of the note was evidence of this, until the contrary were shewn.

At the request of the defendant's counsel, this opinion was filed agreeably to the act of assembly of 24th *February*, 1806, and together with the bill of exceptions on the point of evidence, was brought by writ of error into this Court, where several exceptions were taken, which, however, it is not necessary to state, as the opinion of the Court is confined to

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*Rogers*, for the plaintiff in error, contended, "that *Buchanan* having become a competent witness by the release, the defendant had acquired an interest in his testimony, which neither he nor the plaintiff could defeat. To exclude his testimony, a witness, he said, must be interested at the time when the fact which he is to prove happened; or the interest must be cast upon him by operation of law, or the act of the party for whom he is called. If he becomes interested by his own act, without the consent or interference of the party who requires his testimony, he remains competent. *Peake's Ev.* 157. Therefore, laying a wager on the event of the suit, does not destroy the competency of a witness, though it may affect his credit. *Rex v. Fox*.(a). *Barlow v. Vowel*.(b) If a man, who was before a witness, purchase a part of the land in dispute, he is not disqualified by this act from giving testimony; still less shall he be permitted, by a contrivance entered into with the opposite party, to strip the defendant of evidence to which he was entitled. If *Buchanan* was a witness for any purpose, he ought to have been sworn. What he was called to prove, is not stated, and for aught that appears, he might have been examined to prove payment.

The objection, that an indorser cannot by his testimony destroy the validity of an instrument to which he has put his name, supposing him to have been called for that purpose, has no force in this case, because the rule is confined to negotiable instruments. By the act of 1715,(c) bonds, specialties, and notes, were made assignable, so as to entitle the assignee to sue upon them in his own name; and bonds and promissory notes were placed upon the same footing. The act of 27th February, 1797,(d) was passed with a view to give a negotiable character to promissory notes, bearing date in the city and county of *Philadelphia*, and expressed in a certain form prescribed by the act. The operation of this law, being confined to the city and county of *Philadelphia*, promissory notes bearing date in other places, were left on the same footing as before, and of course all the decisions relative to bonds, and those relative to notes, prior to that act,

(a) 1 Str. 652.

(b) Skin. 586.

(c) 1 Sm. L. 90.

(d) 3 Sm. L. 278.



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are applicable. In *Baring v. Shippen*,<sup>(a)</sup> the assignor of a bond was held to be a competent witness to prove, that he had obtained it fraudulently; and the Chief Justice in delivering his opinion, (p. 165,) declares, that the rule which prevents a man from discrediting an instrument to which he has signed his name, is confined to *negotiable instruments*, and that a bond, though assignable by an act of assembly, is not to be considered as of that description. In *Wheeler v. Hughes*,<sup>(b)</sup> it was also decided, that a bond is not a negotiable instrument, and that, therefore, the assignee takes it subject to every defalcation to which it was liable in the hands of the obligee at the time of the assignment. And the same rule was applied to promissory notes in the case of *M'Cullough v. Houston*,<sup>(c)</sup> in which it was declared, that they were placed upon exactly the same footing with bonds, by the act of 1715, except as to the mode of assignment.

*Hopkins*, for the defendant in error, argued, that as *Buchanan*, after having been released, had agreed to resume his responsibility on his indorsement, which was no more than the performance of a moral obligation, the cancelling of the release, restored the parties to their original situation; and that it was immaterial when he became interested, provided he was so *bona fide*, at the time of the trial. Besides, he observed, the witness had declared on his *voire dire*, that he was interested; and whether a witness be interested in point of law or not, a belief that he is so, will create such a bias in his mind, in favour of the side through which he expects to derive advantage, as ought, in order to keep the streams of evidence pure, to exclude his testimony. Upon this principle, a witness was rejected in the case of *M'Veaugh v. Goods*,<sup>(d)</sup> who expected a compensation for services which he had rendered, from the generosity of the person for whom he was called, provided, the suit should terminate in his favour, but who had no legal claim to such compensation. Upon the same grounds, a witness was not permitted to be sworn, in the case of *Innis v. Miller*,<sup>(e)</sup> and the Court in delivering their opinion in that case, express their decided approbation of the decision of *M'Veaugh v. Goods*, and declare,

(a) 2 Binn. 154.

(b) 1 Dall. 23.

(c) 1 Dall. 441.

(d) 1 Dall. 42.

(e) 2 Dall. 50.

that the law on this subject has been fully settled by modern cases. *Phillips*, in his treatise on evidence, (p. 41 to 48) enters into an argument, to prove the contrary position; but his reasoning, so far from being supported by authority, is directly contradicted by the case of *Fotheringham v. Greenwood*,<sup>(a)</sup> and from the cases collected in a note to the late American edition of that work, (p. 43,) it appears, that it is opposed by nearly the whole current of American authorities.

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There is another rule of law too, which forbade the examination of this witness. He was the indorser of the note, and no one can be permitted to destroy the validity of an instrument to which he has given credit by affixing his name. Without referring to other authorities, the cases of *Stille v. Lynch*,<sup>(b)</sup> and *Resp. v. Ross*,<sup>(c)</sup> both of which were decided prior to the act of 27th February, 1797, and therefore impugna the decision of *McCullough v. Houston*, are sufficient to establish this point.

TILGHMAN C. J. This action was brought by *Samuel Bailie*, the plaintiff below, in the Court of Common Pleas of *Lancaster* county. The charge of the Court is placed on the record, and it appears to me to be correct. There is also a bill of exceptions to the opinion of the Court on the rejection of the evidence of *Thomas R. Buchanan*, a witness produced on the part of the defendant. Mr. *Buchanan* was the indorser of the note on which the suit was brought, and consequently, originally liable to an action. But *Benjamin Long*, the plaintiff, gave him a release, which took away all interest in this suit. In this situation, he was subpoenaed as a witness for the defendant, and in order to deprive the defendant of his testimony, he cancelled the release, and thus became again interested. These facts appeared on the examination of Mr. *Buchanan* on the *voire dire*. He said too, that he considered himself as interested, and bound to pay the note, in case the plaintiff should fail in this suit. From these facts two questions arise. 1. Is a witness incompetent, who considers himself as interested, but *in fact* is not so? 2. Will the law permit a witness to deprive a suitor of his evidence, by rendering himself interested for the purpose of incapacitating himself?

(a) 1 Sw. 120.

(b) 2 Dall. 194.

(c) 2 Dall. 230.

1818. 1. On the first point there has been a diversity of opinion. In the case of *Fotheringham v. Greenwood*, 1 Str. 129, Lord HOLT, sitting at *Nisi Prius*, is reported to have said, that if a witness *thinks* himself interested, he is incompetent, though in truth he have no interest; so, if he be under an *honorary*, though not a binding engagement to pay costs. Upon this authority, the cases of *M'Veaugh v. Goods*, 1 Dall. 62, and *Innis v. Miller*, 2 Dall. 50, seem to have been decided. On the contrary, in *Phill. Ev.* 41, the criterion of competency, is said to be, *the actual interest* of the witness, and *not his opinion* concerning his interest. I confess I never could perceive, on what principle the *dictum* of Lord HOLT, (undoubtedly a very great Judge,) could be supported. The law of evidence has been more maturely considered, and has undergone material changes, especially with regard to the competency of witnesses, since the time of Lord HOLT. Those who hold, that the *opinion* of the witness, contrary to the *fact*, may render him incompetent, assign for a reason, that his mind is under a strong bias, in consequence of his opinion. Undoubtedly it is, but not stronger than the mind of a child, who is called to testify for his parent, and who, besides feeling the tie of natural affection, must be influenced by the consideration, that the estate to come to him after his parent's death, will probably be affected by the event of the suit; yet the child is admitted as a witness, and the bias under which he certainly stands, is submitted to the jury as a circumstance affecting his credibility. The same may be said of an underwriter, who is received as a witness for another person, who has underwritten the same policy. The rule is, that nothing creates incompetency, but actual interest in the cause, in which the witness is to be sworn. Interest or no interest, is a fact which may be ascertained with certainty. But what may be the *opinion* of a man, concerning his interest, cannot be known, till he declares it. Testimony may be lost, by the ignorance of the witness, by his want of candour, or his caprice. Besides, if his opinion, that he *is interested*, excludes him, why should not his opinion, that he has *no interest*, admit him? And yet it has never been contended, that a man *proved* to be interested, may be a witness, because he *thinks* that he has no interest. It seems to me then, that to reject a witness on the ground of his *opinion*, against *fact*, is an anomaly in the law of evidence, and would be attended with

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great inconvenience. In order to preserve uniformity, therefore, and at the same time to avoid inconvenience, I shall be for testing the competency of the witness, not by his *opinion*, but by the *fact*. Neither do I think, that we should pay any regard to *honorary* engagements, because they are things unknown to the law, and therefore leading to uncertainty. When a man speaks of his *legal* engagements, we understand him. But engagements of *honour*, depend on his own ideas; they are too fantastical to be admitted in a court of justice. If under an impression, of being bound in honour, he makes a promise to pay, which may be enforced by an action, he will then be interested, and his testimony must be excluded. But, being bound only by a tie, which he may loosen at pleasure, the law considers him as at liberty, and consequently disinterested.

On the second point, there is little difficulty. Mr. *Buchanan* and the plaintiff united, in a contrivance to deprive the defendant of his evidence. This, the law will not endure. If a man, who is privy to a fact, should afterwards become interested in the usual course of business, his evidence is not to be admitted. It would be unreasonable to expect, that he should sacrifice his own interest, for the sake of preserving himself free from interest, for the benefit of another. In such case, therefore, the witness, being interested at the time of trial, is incompetent. But the case is very different, when a man, knowing himself to be a witness relied on by his neighbour, takes pains to become interested, for the purpose of injuring him, especially if this be done, in concert with the adverse party. Such conduct is very improper; it is, in truth, fraudulent in the eye of the law; and, notwithstanding an interest thus acquired, the witness is considered as disinterested. In *The King v. Fox*, 1 *Str.* 652, and *Barlow v. Vowel*, 1 *Sid.* 586, witnesses who became interested by *laying wagers*, after they had come to the knowledge of the facts, for the proof of which their testimony was wanted, were held to be competent. The case before us, is very strong. There appears to have been a collusion between the plaintiff and the witness; clearly, therefore, the witness remained as competent, after he cancelled the release, as he had been before. I am of opinion, that the judgment should be reversed, and a *venire facias de novo* awarded.

GIBSON J. concurred.

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1818. **DUNCAN J.** Could *Thomas R. Buchanan* be received as a competent witness on the part of *Benjamin Long*, to prove any fact material to his defence? If he could, did he stand in that situation, that by law he could claim an exemption from examination as a witness, on the ground, that his testimony might be prejudicial to his own interest?

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It is to be observed, in considering the first question, that the facts he was called on to prove, are not stated; so that the inquiry is not whether he would be permitted to prove facts which might tend to invalidate the note, which he had given currency to by his indorsement, but whether he was incompetent to prove any fact.

The rule, that no man shall be allowed to destroy or explain away his own instrument, is confined to instruments negotiable. 2 *Dall.* 196. 2 *Binn.* 166. *Baring v. Shippen*. Admitting this to be such, and entitled to all the protection extended to paper negotiable and negotiated, free from every objection, discount, and plea which might be offered by the maker against the original payee, (of which it is not necessary to give any opinion,) the rule never has extended so far as to reject the party offered as a witness. There are some facts, which he certainly having no interest, the ground of policy would not exclude him from testifying. The power of the Court to set aside rules of law, from motives of policy may be justly questioned; but the rule of exclusion of such witnesses ought not to be extended further than it has already been carried; the rule never did render such person altogether incompetent; but restrained him from giving any evidence that contradicted the writing, or denied any thing contained in it. *Pleasants administrator v. Pemberton administratrix*, 2 *Dall.* 196. A party to such instrument will not be permitted to testify that he put a void security into circulation; but as to any facts happening afterwards, he may (if not interested,) be examined. *Warren v. Merry*, 3 *Mass.* 27. *Brown et al. v. Babcock et al. ib.* 31. And by **PARSONS** Ch. J. in *Churchill v. Sutter*, 4 *Mass.* 156, the rule is confined to the invalidation of negotiable instruments; and there he may testify to any facts, excepting such as prove the instrument void at the time of his indorsement. And again in 6 *Mass.* 434, *Barker v. Prentiss*, the whole doctrine is considered; and it is decided, that he may testify to any fact which admits the legality of the instrument in its original

form. So in *Woodhull v. Holmes*, 10 *Johns*. 231, a party to negotiable paper may be admitted to prove facts subsequent to the date or execution of the note, and which destroy the title of the holder. And in *White v. Kibling*, 11 *Johns*. 131, an indorser of a promissory note, indorsed before it became due, is a competent witness to prove payment, and that notice was given to the holder, by such indorser, when he indorsed it.

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As *Buchanan* was not interested to support the defence of *Long*, whatever it might be, he was clearly, as to some facts which might destroy the note in the hands of the holder, a competent witness. Could he then excuse himself by saying, that he was called on to testify against his own interest; in other words, to prove matters which might discharge *Long* from the payment of the note, and so render himself, as indorser, liable even to *Bailie*? At best, this was but an excuse; but the plaintiff below had no right to object to his competency; he was competent, if he chose it. Was then his *unwillingness*, to use his own words in the bill of exceptions, a legal reason to deprive *Long* of the benefit of his testimony? What was the moving cause, or the consideration of the release, we are left to conjecture, but not without a clue to the discovery; but the moving cause for the destruction of the release is avowed; *expect*, I construe as *believe*, *know*; and *Buchanan* declares, that the release was destroyed, because he was called forward as a witness. "I expect, says he, on his *voire dire*, it was, because I was called forward as a witness, that the release was destroyed." It is not permitted to Judges to shut their eyes, and not to see that which is visible to all. It appears at one time, and that very shortly before he was called on to be examined, he possessed a release discharging him from all right of action by *Bailie*, on account of this indorsement, and that this release, on the very morning of the trial, and just before he was subpoenaed as a witness, was destroyed in the presence of *Bailie's* counsel, and was destroyed, because he was called forward as a witness. Shall this contrivance be crowned with success is now the question? Releases from or to persons having an interest, in order to render them competent witnesses are frequently executed at the bar, even after objections to their competency; but this is quite a different expedient; the destruction of a release to disqualify the person to whom the

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release had been given, or to afford him an exemption from the legal obligation of testifying the truth. One is to let in the light of truth, the other is to exclude it. Indeed, releases to qualify have been given at such times, and under such circumstances, as that Courts have rejected the evidence; as is stated in *Gilb. Ev.* 188. If any witness, who has part of the lands, sells, though *bona fide* and for a good consideration, if it be after he is summoned as a witness, or after he has had notice of trial, the Court will not admit his evidence. Whether Courts at this day in their liberal anxiety to let in the whole truth, leaving the credit of the witness to the jury, the Court, nevertheless, making such observations as the situation of the witness required, would so decide, I give no opinion; but that the destruction of this release, taking away all interest, for the avowed purpose of smothering the truth, evidently in fraud of the law, and of the party's vested right to the examination of the witness, should have the effect intended, and cover under the pretence of constitutional privilege of not compelling a man to swear against his own interest, him, who voluntarily subjects himself to a liability, merely that he may not be obliged to declare the truth, would appear to me to be repugnant to the dictates of reason, the rules of evidence, and the principles of justice. In *Pennsylvania*, where there can be no bill to compel a discovery, the reason would be stronger than in *England*. I, therefore, am of opinion, that *Thomas R. Buchanan* should have been sworn in chief, and that his exclusion was error. On principle and on precedent this opinion is formed; it falls directly within the reason of the cases decided; for being a competent witness for *Long* when he was about to be called forward as a witness, just before the subpoena was served on him, he could not by any act of his own, nor any act in conjunction with *Bailie*, deprive *Long* of the right he had in his testimony; it is one of the very exceptions to that great rule of testimony, the most inflexible of all other rules, "*that a person interested is an incompetent witness;*" for a party interested will be admitted where he acquires an interest by his own act, after the party who calls him as a witness, has a right to his evidence. *Barlow v. Vowel*, *Skin.* 586. *Bull.* 313. If this were not the case, an unwilling witness might deprive the party in almost every instance of the benefit of his testimony, by his own voluntary act; but so far from the law permitting

this, the refusal of one to accept a release, cannot deprive the party of his testimony, much less should the voluntary surrender of a *release*. I am, therefore, of opinion, that there is error in suffering the witness to decline giving evidence. The judgment should be reversed, and a *venire facias de novo* awarded.

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Judgment reversed, and a *venire facias de novo* awarded.

MOORE *against* ALBRIGHT administrator of HUNTER.

Same *against* COOK administrator of M'CORD.

IN ERROR.

Thursday,  
May 21.

THESE causes were tried in the Court of Common Pleas of Lancaster county, on issues directed by the board of property, by virtue of an act of assembly, passed the 20th March, 1810. It appeared, that there was a controversy before the board of property respecting the right to receive the valuation money of certain lands within the seventeen townships of Luzerne county, which had been released to the Commonwealth by James Moore, deceased. A claim was made on behalf of Alexander Hunter, and of the representatives of William M'Cord, deceased, who it was alleged were in equity entitled, each to one-third part of the valuation money. The act of assembly directs, that in all cases of that kind which shall be controverted before the board of property, it shall be the duty of the board, on the demand of either party, to direct an issue to the Court of Common Pleas of the county in which the seat of government is, or may be established for the time being, in order to have the right of such contending parties fixed and ascertained, and declares, that "the said Court shall mould the said issue in such manner as shall be calculated to do justice to the contending parties, their own judgment; and it is not material who are the parties to the issue, provided, the matters in controversy be fairly brought to trial.

A writ of error lies on a judgment of the Court of Common Pleas, in an issue framed under the supplement to the act for offering compensation to Pennsylvania claimants of certain lands within the seventeen townships, &c. passed March 20th, 1810, notwithstanding the act declares, that the judgment and decree of that Court shall be final. In framing such an issue, the Court of Common Pleas are to proceed according to

The jury, in an issue so framed, are to find generally for the plaintiff or defendant, and a verdict finding the sums due to each party is bad.



1818. so that the whole merits shall be fully and fairly tried, and  
*Lancaster.* shall have power to decree touching the costs of such issue  
*Moore* as to right and justice shall appertain, &c. and the judgment  
*v.* and decree of the Court thereon shall be final, and the board  
*ALBRIGHT* of property shall issue the certificates for such valuation mo-  
*administrator* nies accordingly.”  
*of HUNTER.*

—  
*Same*  
*v.*  
*COOK*  
*administrator*  
*of M'Cord.*

Two feigned issues were framed in the usual manner by order of the Court of Common Pleas of *Lancaster* county, which was then the seat of government. In one of them *Alexander Hunter* was plaintiff, and the administrators of *James Moore* defendants. In the other, *John Cook* administrator of *William M'Cord* was plaintiff, and the administrators of *James Moore* defendants. In one of these issues a wager was supposed to be laid, that the legal representatives of *Alexander Hunter*, deceased, (not the *Alexander Hunter* named in the issue,) were entitled to one-third part of the valuation money; and in the other the wager was, that the legal representatives of *William M'Cord* were entitled to one-third part of the valuation money. Pending the action *Alexander Hunter*, the plaintiff in the first issue, died, and the Court, against the will of the defendants, permitted the plaintiff's attorney to substitute as plaintiff *Andrew Albright*, the administrator *de bonis non* of that *Alexander Hunter*, who had not been a party to the issue, but who, it was alleged, was really the person entitled to one-third of the valuation money.

On the trial of *M'Cord's* issue, the plaintiff refused to produce the letters of administration of *John Cook*, upon which the defendants prayed leave to put in a plea, that the said *John Cook* was never administrator of the said *William M'Cord*; but the Court refused to admit the plea, and exceptions were taken to the opinion of the Court on both these points. Another exception arose from the verdict returned by the jury in *M'Cord's* issue, which the Court refused to accept. It was in these words:—"The jury take the liberty of reporting to the Court, that the defendant is to receive the first purchase money, and one-third part of the balance of what it was sold for, with costs of warrants, surveys, and money expended for that use. The two-thirds of the balance for the use of the plaintiff."

On the return of the record to this Court, *Montgomery* and *C. Smith*, for the defendants in error, moved to quash the writ, contending, that the proceedings below were final by the act of assembly under which they took place. This act of assembly which was passed on the 20th March, 1810, (a) they said, directs issues to be sent to the Court of Common Pleas in controverted cases, and declares, that the judgment and decree of the Court thereon shall be final, and that the board of property shall issue certificates for such valuation money accordingly. The terms of the law are explicit, and the rule of construction is, that where the words of a statute are plain and clear, they are to be understood according to their genuine signification and import. 6 *Bac. Ab.* 380. 391.

1818.  
*Laurester.*  
 MOORE  
 v.  
 ALBRIGHT  
 administrator  
 of HUNTER  
 —  
 Same  
 v.  
 COOK  
 administrator  
 of M'COAD.

But admitting, that the proceedings below may be removed to this Court, a *certiorari* and not a writ of error, is the proper writ for that purpose, because they were not according to the course of the common law. The case of *Clark v. Yeat*, (b) only proves, that another act of assembly, which took away writs of error, did not extend to cases of landlord and tenant. In the present case, the Court of Common Pleas moulded the issue as they pleased, and were to decide as to costs according to their discretion, making either party or both pay them.

*Hopkins*, contra. The intent of the act of assembly was not to prevent a writ of error, but merely to declare, that when the matter is tried and decided by the Common Pleas, according to law, there should be no further inquiry. The jurisdiction of the Court of King's Bench in *England* cannot be taken away but by express words. *Rex v. Morley*, (c) where it is said, that this point is perfectly settled. It is no less settled in relation to the jurisdiction of this Court. In *Burginhofen v. Martin*, (d) it was taken for granted by counsel, and declared by the Court, that the Supreme Court possessed the power of examining the proceedings of justices of the peace in cases in which the demand was under 40 shillings, though the law gave no appeal to the Common Pleas; and that the jurisdiction of superior courts was only abridged by the express negative words of a statute. The 12th section of the landlord and tenant law, (e) declares, that the judgment

(a) 5 Sm. L. 161.

(b) 4 Binn. 185.

(c) 2 Burr. 1042.

(d) 3 Yeates, 479.

(e) *Purd. Dig.* 580.

1818. of the justices's shall be final and conclusive to the parties, yet  
*Lancaster.* it was decided, in *Clark v. Yeat*,<sup>(a)</sup> that a writ of error lies  
 on a judgment of the Common Pleas, given in a proceeding  
 between landlord and tenant, and removed to that Court by  
*MOORE* *certiorari*. It is not correct, that the proceedings were not  
*v.* according to the course of the common law. They were  
*ALBRIGHT* so exactly, for after the issue was formed it was tried by  
*administrator* jury, precisely like every other issue in that Court. In appeals  
*of HUNTER.* from justices of the peace to the Common Pleas, a writ of  
 — error lies, because, after the appeal, the proceedings are ac-  
*Same* cording to the common law.  
*v.*  
*COOK*  
*administrator*  
*of M'CORD.*

The opinion of the Court was delivered by

TILGHMAN C. J. A motion has been made to quash the writ of error in this case, because the judgment of the Court of Common Pleas was conclusive, and not subject to the jurisdiction of this Court. The cause was tried in the Court of Common Pleas on a feigned issue, directed by the board of property, under the act of 20th March, 1810, 5 Sm. L. 151, in order to decide a controversy between the parties, respecting the share to which they were respectively entitled, of a sum of money, to be paid by the Commonwealth, in consideration of their having released their right to several tracts of land in pursuance of the "Act for offering compensation to the *Pennsylvania* claimants, of certain lands within the 17 townships in the county of *Luzerne*, and for other purposes therein mentioned." The act, by virtue of which the issue was sent to the Court of Common Pleas, declares, "that the judgment and decree of that Court, shall be final." When words are used by the legislature, which had been used in former laws, and received a well known construction, it must be supposed, that it was intended to preserve an uniformity of construction. Now it had been settled long before the act of 20th March, 1810, that the jurisdiction of this Court is not taken away by implication. It is not sufficient, to say, that the decision of the inferior Court *shall be final*. These expressions do not necessarily imply, that the proceedings may not be reviewed for the purpose of correcting errors in law. Two instances were mentioned by the counsel for the plaintiff in error, which fix the construction beyond doubt. By the act of 28th May, 1715, justices of the peace were autho-

(a) 4 Binn. 185.

rised to decide in certain cases, where the debt did not exceed 1818.  
 40 shillings, and it was declared, that *their judgment should* Lancaster.  
*be final and conclusive, to both plaintiff and defendant, with-*  
*out further appeal.* Yet these judgments have always been  
 removed to this Court by *certiorari*; and the proceedings  
 quashed if appearing to be contrary to law. In the act,  
 giving a summary proceeding to landlords to recover posses-  
 sion from tenants who hold over after the expiration of their  
 leases, it is said, "*that the judgment shall be final and con-*  
*clusive to the parties.*" Yet these proceedings have always  
 been reviewed on removal to this Court by *certiorari*. But  
 it is contended, that the proceedings in the case before us, if  
 subject to our jurisdiction, should have been removed, not  
 by writ of error, but *certiorari*; because, they are not accord-  
 ing to the course of the common law. The principle is just,  
 that proceedings not according to the course of the common  
 law, are not removeable by writ of error. But what is the  
 fact? It is true, that the proceedings before the board of  
 property were not according to common law. But those in  
 the Common Pleas, were strictly so. The record shews a  
 declaration, plea, issue, and trial by jury, in the usual form.  
 It is on that record only, that we are to decide. With the  
 board of property we have nothing to do. I cannot distin-  
 guish this case from an issue sent by the Register's Court to  
 be tried in the Common Pleas, on a disputed will. The Re-  
 gister's Court does not proceed according to the common  
 law. But the issue is tried in the Common Pleas according  
 to the common law, and therefore the record may be remov-  
 ed to this Court by writ of error. This is the usual long  
 established practice; and considering it as decisive of the  
 present question, I am of opinion, that the motion to quash  
 the writ of error should be dismissed.

MOORE  
 v.  
 ALBRIGHT  
 administrator  
 of HUNTER.  
 —  
 Same.  
 v.  
 COOK  
 administrator  
 of M'CONN.

The motion to quash the writ of error having been dis-  
 missed, the counsel proceeded to argue the exceptions taken  
 to the proceedings of the Court below; after which

TILGHMAN C. J. delivered the opinion of the Court, as  
 follows, having previously stated the case.

It was the object of the act of assembly under which these  
 issues were framed, to have the merits of the controversy  
 tried in the Court of Common Pleas, according to the rules

1818. of the common law. The board of property was to direct an issue, and inform the Court of Common Pleas of the subject of that issue. The Court was then to mould the issue according to their discretion. The board of property transmitted to the Court, a transcript of the proceedings which had taken place before them, and directed, in general terms, that an issue should be formed. They might have been more particular in their directions, but what they did, was sufficient in substance. There was enough before the Court, to shew them the subject of the controversy. In the forming of the issue, the Court were to proceed according to their own judgment. It was not material who were made plaintiffs or defendants, provided the matters in dispute were brought to trial. It is our duty to examine, whether the trial was conducted according to law. As to the form in which the matter was brought to trial, it appears to me, that we ought not to intermeddle. Indeed we are too much in the dark, as to the transactions which gave rise to this controversy, to judge whether a better form could be devised than that which was adopted by the Court of Common Pleas. We have heard something of articles of agreement between *James Moore*, *Alexander Hunter*, and *William M'Cord*, in pursuance of which the released lands were taken up. But what these articles were, we know not. It is impossible for us, therefore, to say, that the Court of Common Pleas were wrong, in permitting *Andrew Albright* to be placed as plaintiff on the record, or in refusing to suffer the defendant to put in a plea, that *John Cook* was not the administrator of *William M'Cord*. These were circumstances affecting only the form, and not material to the merits of the trial. They do not appear to be errors.

Another exception was taken to the opinion of the Court, in *M'Cord's* issue. The jury offered a kind of verdict, as follows:—"The jury take the liberty of reporting to the Court, that the defendant is to receive the first purchase money, and one-third part of the balance of what it was sold for, with costs of warrants, surveys, and money expended for that use. The two-thirds of the balance, for the use of the plaintiff." This the Court refused to receive, and told the jury, that if they were of opinion *M'Cord* had a right to one-third of the lands released, they should find generally for the plaintiff; but if their opinion was otherwise, they should find

Lancaster.

MOORE

v.

ALBRIGHT  
administrator  
of HUNTER.

Same

v.

COOK  
administrator  
of M'CORD.

for the defendant. In this, the Court did no more than hold the jury to the issue, which was certainly right. The point of the issue was, whether *M'Cord* was entitled to one-third. A finding on any other point, was wandering from the mark.

Upon the whole, I am of opinion, that no error appears on the record, and therefore the judgment should be affirmed.

Judgment affirmed.

1818.  
*Laucaster.*  
MOORE  
v.  
ALBERT  
administrator  
of HUYER.  
—  
Same  
v.  
Cook  
administrator  
of M'CORD.

WINGERT and another *against* CONNELL for the use of  
M'CALL.

IN ERROR.

*Monday,*  
*May 25.*

IN this suit the plaintiff filed a statement agreeably to the 5th section of the act of 21st March, 1806, (a) in the Common Pleas of *Dauphin* county. The next Term of the Court commenced on the 29th August, 1814, and continued two weeks. On the 30th August, the plaintiff entered judgment by default; which the Court refused to open, on the application of the defendant's counsel. Several other proceedings took place, which were the subjects of exceptions here, but which it is not material to mention, as the opinion of the Court is confined to that which arose out of the entering of the judgment by default, prior to the time when, by the act of assembly, the plaintiff was entitled to such a judgment. The time given to the defendant to appear, is the third day of the next succeeding Term to which the process issued is returnable, when the Term is for one week, and the second *Monday* of the Term, when it is to continue two weeks.

The Court reversed a judgment by default entered under the 5th section of the act of 21st March, 1806, prior to the time allowed by the act for the defendant's appearance.

*Elder*, for the plaintiffs in error.

*A. Hopkins* and *Ellmaker*, contra.

By THE COURT. The judgment was professedly taken under the act of assembly, yet it was contrary to the act of

(a) 4 Sm. L. 328.

1818. assembly, because it was entered previous to the time allowed by the act for the defendant to appear. At the time of entering the judgment, there was no default in the defendant. We are of opinion, that the judgment should be reversed.

*Lancaster.*  
*WINGERT*  
 and another  
 v.  
*CONNELL*  
 for the use of  
*McCALE.*

Judgment reversed.

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WILSON against HAMILTON.

IN ERROR.

*Monacy,*  
*May 25.*

4 SR 238

212 286

verture after the bringing of the suit cannot be pleaded after a plea in bar, unless it took place after the plea in bar; in which case it may be done, but the defendant must not suffer a continuance to intervene between the happening of this new matter or its coming to his knowledge, and pleading it.

The plaintiff is not bound to reply to a plea in abatement, put in out of time. Therefore, if the cause be tried on the former plea, though no issue be joined on the plea in abatement, it is not error.

JANE HAMILTON, the defendant in error, brought an action of *assumpsit* in the Common Pleas of Lancaster county against John Wilson, executor of John Wilson deceased, to recover her share of the residue of the testator's estate undisposed of by his will. The defendant pleaded *non assumpsit* and payment, on which issue was joined, and the cause came on to be tried at August Term, 1817. After the jury had been sworn and evidence given, the defendant moved for leave to plead, that since the bringing of the suit, the plaintiff had intermarried with one Joel Baker, who was still in full life. The Court, thinking themselves bound by the act of assembly of 21st March, 1806, admitted the plea. The plaintiff, however, did not reply, and the cause was tried on its merits; the Court instructing the jury to regard the plea of coverture as a nullity, and not to suffer it to have any effect on their decision. The verdict was for the plaintiff, and the cause being removed to this Court by writ of error, the charge of the Court below on the point above stated, as well as on two others which were afterwards abandoned, was assigned for error. It was also contended, that there was error in there being no issue joined on the plea of coverture.

*Slaymaker and Hopkins*, for the plaintiff in error, cited, Act of 21st March, 1806, sect. 6.(a) *Bull. N. P.* 309, 310.

(a) *Purd. Dig.* 326.

*Broome v. Beardesley.*(a) *Bancker v. Ash.*(b) *Morgan v. 1818.*  
*Dyer.*(c) *Morgan v. Dyer.*(d) *Van Benthuysen v. De Witt.*(e) *Lancaster.*  
*Brown v. Barnett.*(f) 3 Bl. Com. 316.

WILSON  
 v.  
 HAMILTON.

*Buchanan and Montgomery, contra, cited, 1 Chitty on Pl.*  
*437. 470. 636. Barber v. Palmer.*(g) *Vaughan v. Browne.*(h)  
*1 Com. Dig. 80. Abatement, H. 42. 2 Tid. 1021. Palmer v.*  
*Green.*(i)

The opinion of the Court was delivered by

GIBSON J. It is very certain a plea *puis darrien continuance* waves all former pleas; that the defendant must stand or fall by it; and that if put in issue it forms the only subject of inquiry before the jury. It admits the original merits to be with the plaintiff, and rests the defence on something that has occurred, or some act that has been done by the defendant since the last continuance of the cause. If it be well pleaded, issue must be taken on it, or there will be a mis-trial; if it be bad on its face, the plaintiff must demur; but if good, in point of form, though pleaded out of due time, the proper course is to move to have it set aside. Coverture after suit brought, is a plea in abatement, which never can be pleaded after a plea in bar, unless the matter has arisen since the plea in bar, in which case it may, provided it be done the first opportunity that is presented; for the plea in bar waves only matters in abatement then existing. But the defendant must not suffer a continuance to intervene between the happening and pleading of this new matter; and this is the rule as to all matters arising after issue joined, whether going to the merits or disclosing a personal disability to maintain the suit. But for extrinsic reasons the Court may exercise a discretion in receiving such a plea, even after a continuance. Here the plea was neither good in point of form nor pleaded in due time. The marriage is not stated to have taken place since the last continuance, which is an indispensable averment in every plea of this sort. If a continuance had in fact intervened, before it came to the knowledge of the defend-

(a) 3 Caines, 172.

(b) 9 Johns. 250.

(c) 9 Johns. 255.

(d) 10 Johns. 161.

(e) 4 Johns. 213.

(f) 2 Binn. 33.

(g) 1 Salk. 178.

(h) 2 Str. 1106.

(i) 1 Johns. Cas. 101.



1818. ant, it would still have been necessary to plead it in this way, but the Court to preserve consistency would have permitted him to enter the plea *nunc pro tunc*, an affidavit of the truth of the plea, and the extrinsic matter first being made. Without an allegation of the matter having arisen since the last continuance, there can be no such thing as a plea *puis darrien continuance*; its name imports its nature. It is the only plea that can be put in after a plea in bar; and must be drawn with great certainty. The plea offered was not such, although so intended: it was an ordinary plea in abatement offered at a time when no such a plea could be received, and when the fact it went to controvert, had been conclusively admitted by the previous pleadings in the cause. Nor does the act of assembly relied on, help the defendant's case. That act merely permits an amendment to be made, or a plea to be added after the jury are sworn. This the liberality of the Courts had never refused, at any previous stage of the proceedings. The act permits nothing to be done during the trial, that might not have been done before it commenced. This plea could not have been received before the jury were sworn, and was therefore not within the act. But on another ground it was inadmissible under the act; it did not go to the original merits of the controversy, but in fact admitted the plaintiff had merits; and to all this may be added, it was notoriously bad on its face, and therefore not a fit subject for the discretion of the Court. The plea then ought not to have been received; and although the Court did receive it, they had the power to set it aside. It is true, they did not formally strike it off the record, but they did what was equivalent, they treated it as a nullity. The plaintiff was not bound to reply, and did not reply; consequently the Court did not err in instructing the jury, that the matter contained in this plea formed no part of their inquiry. We are of opinion, the cause was properly tried on the pleas of *non assumpsit* and payment, and that the judgment must be affirmed.

Judgment affirmed.

1818.

Lancaster.| *LE FEVRE against L.E FEVRE and others.*

IN ERROR.

Monday,  
May 25.

4s/241
183 198
4s/241
108 512

4 SR 241
21 SC 147

UPON a writ of error to the Court of Common Pleas of Lancaster county it appeared, that this was an action of trespass *vi et armis*, brought by the plaintiff in error against the defendants, for cutting and destroying a conduit pipe, used by him for supplying his tanyard with water, and thus preventing the water from flowing into the tanyard, through the said pipe, for the space of three weeks; in consequence of which the tanyard was deprived of the use of the water which ought to have flowed through the said pipe.

Parol evi-
dence is ad-
missible to
prove, that
after the ex-
ecution of a
deed convey-
ing a right to
a water course
through the
granted land,
by courses and
distances, a
verbal agree-
ment was en-
tered into be-
tween the
parties for
their mutual
accommoda-
tion, altering
the route of
the water
course; pro-
vided the
agreement
has been car-
ried into
effect.

4 SR 241
31 SC 50

The pleas were not guilty and justification.

The plaintiff gave in evidence a deed, dated *October 12, 1793*, from *Joseph Le Fevre*, one of the defendants, and wife, to *Adam Le Fevre*, for an acre and an half of land for a tanyard, with the right of conveying the waters of a stream running through the adjoining lands of the grantor, into the premises which were granted, for the purpose of supplying a tanyard intended to be erected thereon, and of laying pipes through these lands for the conveyance of the water; describing the route of the water course, by courses and distances. He then gave in evidence a deed dated *June 23, 1796*, from *Adam Le Fevre* and wife to *Daniel Aspenshade*, conveying the same premises, together with the water right. Articles of agreement, dated *March 3, 1810*, between *Aspenshade* and *Daniel Le Fevre*, the plaintiff, for the sale of the same land with the water right, and three or four adjoining acres, and a deed dated *March 30, 1811*, in pursuance of these articles, were there laid before the jury.

4 SR 241
216 289
33 SC 125

4s/ 241
226 239

The plaintiff then offered to prove by *Daniel Aspenshade*, that after the pipes had been in use some time, it became necessary to lay new ones, when *Joseph Le Fevre* proposed to *Aspenshade* to change the route of the water course, as a matter of convenience to both parties, from the dry ground marked out by the deed, to the low wet ground near the

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1818. stream, and to carry them higher up the stream than the spot  
*Lancaster.* designated by the deed, which would make the new pipes more  
 durable and save the necessity of a dam; that to this propo-  
 sal *Aspenshade* acceded, and *Jos. Le Fevre* accordingly staked  
 off the new route, upon which *Aspenshade* laid the pipes and  
 covered them, carrying them up the stream to the spot agreed  
 upon; that these conduit pipes continued to be used without  
 molestation by *Aspenshade*, for six or seven years, proving to  
 be a great advantage to both parties, and were in use at the  
 time he sold to the plaintiff; that *Aspenshade* was the sole owner  
 of the tanyard and water right, agreeably to the deed from  
*Adam Le Fevre* to him, and that *Joseph Le Fevre* was the  
 owner of all the lands through which both routes of the pipes  
 passed, at the time it was agreed to change their course.

To this evidence the defendant's counsel objected, and the  
 Court sustained the objection. The plaintiff's counsel ten-  
 dered a bill of exceptions.

*Jenkins* and *Hopkins*, for the plaintiff in error. The alte-  
 ration of the route offered to be proved, was proposed and  
 marked out by *Joseph Le Fevre* himself, for the advantage  
 of both parties, and it saved him from the erection of a dam  
 on his land. The plaintiff purchased on a view of the water  
 as it ran on the new route, without notice from *Joseph Le*  
*Fevre*, and if the original contract is to be adhered to, it is a  
 gross fraud upon him. To the objection, that an incorporeal  
 right cannot be granted by parol, it may be answered, that  
 the water right was created by deed, and the parol agreement  
 only went to alter the course of it. It did not contradict the  
 deed, and the evidence was therefore admissible. *Sugden*, 97,  
*and the cases there collected.* Besides, it was a right to the  
 water which was claimed, which is corporeal, and therefore,  
 it was not an incorporeal hereditament.

Since the statute of frauds, lands can no more pass without  
 deed, than incorporeal rights, yet an agreement in relation to  
 them, in part performed, is binding. The reason is, that after  
 a parol agreement varying a written one, has been acted  
 upon, it would be a fraud to enforce the original contract;  
 and therefore after signing a written agreement, parol evi-  
 dence may be received to shew, that the parties entered into  
 a verbal agreement, varying the former one. *Phill. Ev.* 450.  
 In the principal case, the parol agreement had been carried

into effect at great expense to the plaintiff, at the suggestion of *Joseph Le Fevre*, and had been acted upon for the mutual benefit of both parties for six or seven years, without interruption. Though, therefore, an incorporeal right will not pass without deed, yet under such circumstances, chancery would compel a deed to be executed, according to the altered route, and if so, this Court will consider as done, what in equity ought to be done.

1818.

*Lancaster.**Le Fevre**Le Fevre*

and others.

*Rogers*, for the defendants in error, insisted, that the permission given by *Joseph Le Fevre*, to *Aspenshade*, to carry the water along the new route, was merely during pleasure, and did not convey a right in fee to this privilege. The right of soil remained in *Le Fevre*, and the privilege of conveying water through it, was an incorporeal right, which could not be vested in another but by deed. 2 *Bl. Com.* 17. 32. *Co. Litt.* 51, a. sect. 64, 65. It was, therefore, perfectly correct to reject testimony which went to contradict the deed, and set up a new verbal contract, inconsistent with it.

The opinion of the Court was delivered by

DUNCAN J. The rejection of the evidence is endeavoured to be supported on two grounds. 1st. That this right of water, &c. was incorporeal, and could pass only by deed. 2d. That the evidence offered was in direct contradiction to the deed.

1st. From the view in which I have considered this evidence, it is unnecessary to decide, whether this right is corporeal or incorporeal. Whatever it was, the first route, &c. conveying the water is granted by deed. One thing is very certain, it is such right as is tangible; its existence is not merely in idea or abstracted contemplation, but a substance which may be always seen; always handled; it is an exclusive right to the occupation of the route granted. Incorporeal things are in their nature invisible, *quare neque tangi, nec videri possunt*, and for these ejectments will not lie. *Runn Ej.* 36. But an ejectment will lie on a right reserved in a deed, of erecting or building a dam on the bank of a creek at the place specified. *Jackson v. Buel*, 9 *Johns.* 299. Wherever a right of entry exists, and the interest is tangible, so that possession can be delivered, an ejectment will lie.

An ejectment would lie here, but an ejectment will not lie

1818. for a mere incorporeal hereditament. *Lessee of Black v. Hepburn et al.* 2 Teates, 331. The Court say incorporeal things are in their nature invisible; not capable of being delivered in execution; not susceptible of actual possession.

LE FEVRE  
v.  
LE FEVRE  
and others.

I own the inclination of my mind is, that an interest in the soil at the given place passed, not only for laying the pipes, but for occupying and possessing exclusively the spot designated by the grant. But if this was a mere incorporeal right, the subject only of a grant by deed, and not by livery and seisin, still the evidence would be admissible; not to pass absolutely the soil by parol agreement, but such an executed contract, as that, on the ground of fraud, chancery would direct a specific execution, or restrain the defendant from disturbing this right.

Wherever a court of equity would direct a conveyance, or enjoin a party from prosecuting his legal right on account of an existing equity against the existence of the legal right, or of a fraud committed on the party, our laws will, by considering the act to be done, which in equity ought to be done, grant as adequate relief as a court of chancery could by forbidding the party to recover a right which in equity he is considered as having relinquished.

The decisions of the courts of equity on the statute of frauds and perjuries, proceed on the principle, not that the right passes by the parol agreement, but that wherever one party has in part executed it, by payment of money, taking possession and making valuable improvements, the conscience of the other is bound to carry it into execution; and equity will compel him to do it. It cannot be questioned, that the execution of an agreement in writing, not under seal, respecting an incorporeal right, would be decreed to be executed by a deed under seal.

It would be a fraud on *Aspensshade*, after the change of route at the request of *Joseph Le Fevre*, and for his benefit and advantage, staked out by himself, and the pipes laid by himself, to defeat the right and the possession thus acquired, after the expense to which *Aspensshade* had been put, and after the long acquiescence in such possession. But the fraud would be still greater on the plaintiff, a purchaser for a valuable consideration, with the possession notorious, and notoriously enjoyed for years. If *Joseph Le Fevre* had brought a suit against *Daniel Le Fevre*, chancery would have granted an in-

junction; if so, courts of common law would not suffer him to take the law into his hand and destroy the pipes which had been laid, not only by his own acquiescence, but with his own hand, and for his own benefit.

We are not without authority, if authority were required, to establish so plain a principle of justice and of equity, for in 2 *Eq. Abr.* 522, we have the very case. *A*, diverted a water course, which put *B* to great expense in laying of sooths, &c. and the diversion being a nuisance to *B*, he brought his action, and an injunction was decreed on a bill exhibited for that purpose; it being proved, that *B*, did see the work when it was carrying on, and connived at it without shewing the least disagreement, but rather the contrary. *Short v. Taylor*, in Lord SOMERS's time, was cited, which was thus: *Short* built a fine house; *Taylor* began to build another, but laid part of his foundation on *Short*'s land; *Short* seeing this, did not forbid him, but on the contrary, very much encouraged it, and when the house was built he brought an action, and Lord SOMERS granted an injunction, and said it was but just and reasonable; for being a nuisance, every continuance is a fresh nuisance, and so he would be perpetually liable to actions, which would be hard when he was encouraged by the party himself. And so was the law laid down in an action for nuisance, tried before the present Chief Justice, at a Circuit Court at *Carlisle*. — *v. Ege*.

But this is likened by the counsel of the defendants in error to a parol license, which may be revoked. A parol license may be revoked, but if it has been acted upon and the party put to expense, it cannot be recalled, and the party made a wrong-doer.

2d. As to the objection, that this evidence was in direct contradiction to the deed, the evidence was not offered for that purpose, but to shew a substitution of another spot, as being more for the mutual benefit of both parties. If this had not been carried into effect, the evidence would not have been admissible; but where the situation of the parties is altered, by acting upon the new agreement, as here, the evidence is proper; for a party may be admitted to prove by parol evidence, that after signing a written agreement the parties made a verbal agreement, varying the former; provided their variations have been acted upon, and the original agreement can no longer be enforced without a fraud on one party.

1818.

*Lancaster.*

LE FEVRE

v.

LE FEVRE  
and others.

1818. On every principle of law, justice, and equity, this evidence ought to have been received, and the judgment must be reversed.

*Lancaster.*  
 LE FEVRE  
 v.  
 LE FEVRE  
 and others.

Judgment reversed.

+ HESS executor of HESS against HEEBLE.

*Monday,*  
 May 25.

IN ERROR.

ERROR to the Common Pleas of *Lancaster* county.

In general, evidence is not admitted to contradict a record; but where issue is joined on a special declaration in *assumpsit*, the plaintiff may give evidence in support of his case, though it may be inconsistent with the record of another action brought by him against the same defendant; but the effect of the evidence when given is to be decided by the Court.

It was an action of *assumpsit* brought to recover forty pounds, part of the price of a tract of land sold by the plaintiff to the defendant, on the 2d *April*, 1800. By the terms of the contract which was declared upon specially, the defendant was to pay one hundred pounds on the first of the following *May*, and fifty pounds in two years afterwards, or by two annual instalments at his option. He paid sixty pounds, part of the first payment, and for the remaining forty pounds this suit was brought. Notwithstanding the pendency of the present action, the plaintiff brought to *November* Term, 1802, a second suit for ninety pounds, the whole sum due after deducting the payment of sixty pounds. It was tried at *August* Term, 1807, when he obtained a verdict and judgment for one hundred and eighty dollars and forty-one cents, being a little more than the amount of the last payment of fifty pounds with interest. On the trial of the present cause, the plaintiff having given in evidence the record of the former recovery, offered to prove, that the two suits were brought on the same agreement; the present being brought for forty pounds the residue of the first payment, and the second for the last payment of fifty pounds. This evidence was rejected, and a bill of exceptions sealed, which, however, was withdrawn during the argument. The plaintiff then offered to prove the contract as above stated; the payment of sixty pounds; the non-payment of forty pounds, part of the first payment, and that the second suit in which there was a recovery was brought for the remainder of the purchase mo-

ney. This too was rejected. He then offered to prove the contract as laid in the declaration, which being also rejected, he excepted to the opinion of the Court, and the cause was removed to this Court by writ of error.

1818.  
*Lancaster.*  
Hess  
v.  
Hessle.

*Hopkins and C. Smith*, for the plaintiff in error, cited *Thomas v. Rumsay*.(a) *Lyttle v. Lee*.(b) *Snider v. Croy*.(c) *Haak v. Breidenbach*.(d) *Phill. Ev.* 235.

*Buchanan and Montgomery*, for the defendant in error, cited, *Hitchen v. Campbell*.(e) *Brockway v. Kinney*.(f) *Snider v. Croy*.(g) *Rice v. King*.(h) *Johnson v. Smith*.(i) *Manny v. Harris*.(k) *Curtis v. Groat*.(l) *Irwin v. Knox*.(m)

The opinion of the Court was delivered by

GRISON J. Without pretending to determine what would have been the effect of the recovery, in the second suit, on a question, whether the plaintiff might give evidence, that the present demand had not been submitted to the jury, or considered by them, notwithstanding it was included in the declaration, we are of opinion, that all the evidence which went to shew the second suit was brought to recover the last payment only, was inadmissible. The question was not, whether the plaintiff should explain, by parol evidence, what was submitted to, and what withdrawn from, the consideration of the jury, but whether he might shew the second suit was brought for but 50*l.* the last payment, when it appeared by the record he had given in evidence, that it was brought for 90*l.* the whole sum due after deducting 60*l.* paid. This was in direct contradiction of the record, and inadmissible. As the cause will go back to another jury, it will be in the power of the defendant, by pleading a former recovery, or giving the record in evidence, to raise the question, how far that recovery is conclusive, in this action, as to all matters contained in the declaration, or how far the plaintiff may explain what

(a) 6 *Johns. Rep.* 33.

(b) 5 *Johns. Rep.* 112.

(c) 2 *Johns. Rep.* 227.

(d) 6 *Binn.* 12.

(e) 2 *Bl. Rep.* 327. 3 *Wils.* 304. S. C.

(f) 2 *Johns. Rep.* 210.

(g) 2 *Johns. Rep.* 230.

(h) 7 *Johns. Rep.* 20.

(i) 8 *Johns. Rep.* 383.

(k) 2 *Johns. Rep.* 30.

(l) 6 *Johns. Rep.* 168.

(m) 10 *Johns. Rep.* 365.



1818. *Lancaster.* was, or was not submitted to the consideration of the jury ;  
 HEN But it is extremely clear, the plaintiff was not estopped by the  
 v. record produced from proving his case as laid. The value  
 HERBLE. of the evidence when given was one thing ; its competency  
 another. We are decidedly of opinion, it should have been  
 admitted ; the judgment, therefore, must be reversed.

Judgment reversed.

KOHR *et ux.* against FEDDERHAFF and another execu-  
 tors of EISENHAUER.

IN ERROR.

Friday,  
 May 30.

ERROR to the Common Pleas of *Lebanon* county.

In an action  
 for a distribu-  
 tive share of a  
 decedent's es-  
 tate, the set-  
 tlement of the  
 administration  
 account in the  
 Orphans' Court  
 is not  
 conclusive.

The action was brought for the plaintiff's distributive share of the estate of the testator. The Court charged the jury, that the settlement of the estate in the Orphans' Court was conclusive, and not open to investigation.

After a very short argument by *Godwin*, for the plaintiffs in error, and *Weidman*, for the defendants in error,

The opinion of the Court was delivered by

DUNCAN J. The only evidence appearing on the record was, the administration account settled in the Orphans' Court ; and upon this the Court charged the jury, that it was not open to investigation. This would preclude the defendant from shewing errors on the face of the account, and would preclude the jury from investigating those errors. We cannot help perceiving, that the evidence is not all on the record, and therefore, we proposed to the counsel for the defendants in error, to place it there by consent. This not being done, we

must decide upon the record as it is. We are of opinion, 1818.  
that the charge of the Court was erroneous. The judgment, *Lancaster*.  
therefore, should be reversed, and a *venire facias de novo* awarded.

KOHN *et ux.*  
v.

Judgment reversed, and a *venire facias*  
*de novo* awarded.\*

FEDDERHAFF  
and another  
executors of  
EISENHAEUER.

\* This point appears to have received the decision of this Court as early as the  
year 1786, in the case of *Marriott et ux. v. Davey et al. executors*, 1 *Dall.* 164.

[REPORTERS.]

### HECK *against* SHENER.

4s 100
140 000
4s 249
170 50

IN ERROR.

Saturday,  
May 30.

ON a writ of error to the Common Pleas of *Dauphin* In an action  
county, it appeared, that this was an action brought by *Catherine Shener*, the defendant in error, against *John Heck*, for to recover  
services performed for him as *his house-keeper*, and for goods a *house-keeper*  
sold and delivered. The pleas were *non assumpsit* and pay- for services as  
ment, with leave to give the special matters in evidence. goods sold and  
The plaintiff having gone through her evidence, the defend- delivered, evi-  
ant offered to prove, that during the time in which the plain- dence that the  
tiff claimed compensation for her services as a house-keeper, plaintiff was  
and while she was in the defendant's service, she did, with- guilty of mal-  
out the knowledge of the defendant, give various articles be- feissance in the  
longing to the defendant, and had them sent and carried execution of  
away from his house to her daughter's house in *Harrisburg*, her trust, and  
to be used by her as her own. To this evidence the plaintiff embezzled the  
objected, and it was rejected by the Court, upon which the goods of the  
defendant's counsel excepted to the Court's opinion. defendant, is  
not admissible  
by way of set-  
off; but it may  
be received  
under the plea  
of *non as-  
sumpsit*, to  
defeat the ac-  
tion.

After argument by *Elder* and *Hopkins*, for the plaintiff in  
error, and by *Godwin* and *Fisher*, for the defendant in error,  
the following opinions were delivered by the Judges, who  
have entered so fully into the case, as to make it unnecessary  
to give a note of the arguments of counsel.

TILGHMAN C. J. It is contended for the defendant, that  
the evidence was proper, either by way of set-off, or under  
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1818.  
*Lancaster.*

HACK  
v.  
SEWELL.

the plea of *non assumpsit*, as a defence against the action. As a set-off, I do not think it was evidence. Our act of assembly authorising a set-off, is expressed in more extensive terms than the British statute; but it has been settled, that it does not comprehend matters of a *tortious* nature. This was decided in the case of *Kachlein v. Ralston and others*, 1 *Yeates*, 571, reported under the name of *Kachlin v. Mulhallon*, 2 *Dall.* 237. But whether the evidence was admissible under the plea of *non assumpsit*, is a question of considerable difficulty. The Courts have been struck with the inconvenience of perplexing the jury with matters of a different nature. Hence some Judges have been of opinion, that when the evidence is of such a nature, that the defendant may support an action on it against the plaintiff, it is best to put him to his action, and not suffer him to give the evidence by way of defence. Others, perceiving the impolicy of multiplying suits, and the hardship of not suffering the defendant to avail himself of matters arising out of the very transaction on which the plaintiff founds his suit, have been for receiving the evidence. I am not permitted to cite the adjudications in the British courts since the American revolution, or it would be easy to shew, that the Judges have differed in opinion, and the question is at the present moment unsettled. As it was likewise unsettled at the time of the revolution, we are at liberty to decide it now according to the reason of the thing, aided by the sentiments expressed from time to time by our own Judges. By the plea of *non assumpsit*, the defendant puts the plaintiff on proving his whole case, and entitles himself to give in evidence any thing which shews, that at the time the action was commenced, the plaintiff had no right to recover. Conformably to this principle, it is said in *Peake's Law of Evid.* 248, that "if the plaintiff's demand be compounded of skill and materials, and he has greatly mis-conducted himself, as where an apothecary, giving medicines on his own judgment, and not under the directions of a physician, appears to have been grossly negligent or ignorant, this fact furnishes a defence on the general issue." It is evident, that upon the same principles, if a physician sues me for his services, I may give evidence, that he has treated me unskilfully, or if a carpenter brings suit for work done for me, I may shew, that it was badly done. So, whatever be the nature of the services for which the plaintiff demands

compensation, I may shew that those services were ill-performed ; for by such evidence, I do no more than meet the plaintiff on his own allegation ; I prove, that he did badly, what he ought to have done well. The principle being settled, we have only to apply it to the present case. The plaintiff claimed compensation for services as a house-keeper. It is the duty of a house-keeper to take care of the household goods. The defendant offered to prove, that the plaintiff did not take care of his goods, and to shew the particular manner in which she violated her trust, viz. that she sent sundry articles to her daughter's house, and suffered her to make use of them. How is neglect of duty to be shewn, but by shewing the particular acts of negligence or malfeasance ? It appears to me, that the evidence was proper, because it went to the gist of the action. But several cases were cited by the plaintiff to shew, that in this Court, similar evidence had been rejected. I will consider those cases. The first was *Kachlein v. Ralston, &c.* mentioned before. The plaintiff brought debt on a bond given by the defendant for the consideration of a mill and land, which he had bought of the plaintiff, and in the contract of sale the plaintiff had reserved the right of erecting a dam on the adjoining land, and swelling the water, provided, that no injury was done to the mill sold to the defendant. The defendant offered to prove, that the plaintiff had erected a dam, which injured his mill. The Court overruled the evidence. The reason is plain ; that evidence was no denial of the action, which was debt on a bond ; but it was a fact of a nature quite distinct from the debt, and which, if evidence at all, could only be admitted as a set-off. As a set-off, the Court did not think proper to admit it, being of opinion, that it was not within the act of assembly. They left the defendant, therefore, to his action for the tort. The next case relied on by the defendant is *Dunlop's lessee v. Speer*, 3 Binn. 169. *Dunlop* had a judgment against *Speer*, which he assigned to certain persons in trust, to receive the payment of 1600*l.* lent by *John Sheller* to *Speer*. There were articles of agreement between *Sheller* and *Speer*, by which *Sheller* covenanted to serve *Speer*, in the capacity of founder at his iron works. *Sheller* issued an execution in the name of *Dunlop*, on the assigned judgment, on which *Speer* moved the Court to stay the execution, and let him into a trial, in order to make a set-off against the judgment, for damages

1818.

*Lancaster.*

HECK

v.

SHELLER.

1818. which he claimed under the articles of agreement, in consequence of *Sheller's* having neglected his duty as founder, and seduced his servants from his service. The Court rejected the evidence; and the main reason was, that it appeared by the articles of agreement, that it was not intended to blend these two transactions; on the contrary, it was understood, that the assignment of the judgment should stand simply, as a security for the 1600*l.* lent by *Sheller* to *Speer*. Here too, it is plain, that the evidence offered by *Speer*, if admissible at all, was only so by way of set-off, so that it does not touch the present case, where the evidence was not to maintain a set-off, but to contradict the plaintiff's statement of his cause of action. But the case of *Steigleman v. Jeffries*, 1 *Serg. & Rawle*, 477, shews the strong inclination of this Court to let in evidence, arising out of the same transaction on which the plaintiff founds his action. It was an action of debt on a bond given for the price of some mill-stones purchased by the defendant of the plaintiff, and the defendant was permitted to give in evidence, a warranty of the stones, made by the plaintiff at the time of sale, and a breach of that warranty. The same inclination to let in evidence, appears in the case of *Cooke v. Rhine*, 1 *Bay's Rep. (South Carolina)*, 16. In an action for work, labour, and services done and performed by the plaintiff for the defendant, evidence was admitted on the part of the defendant, that the work was not done within the time agreed on. As to the objection of the plaintiff being taken by surprise, it is no greater surprise, than when under the same plea, the defendant gives in evidence, a release, infancy, or coverture. Neither do I think there is much force in the other objection, that the matter of the evidence is not a liquidated debt or demand. If it is of sufficient magnitude to bar the plaintiff's action, there will be no need of going into calculations. But if not sufficient for that purpose, it is as easy for the jury in this action to ascertain the amount to be deducted from the plaintiff's demand, as for the jury in an action to be brought by the defendant against the plaintiff to ascertain the amount of his damage. My opinion is, that the evidence rejected by the Court of Common Pleas, ought to have been admitted, and therefore, the judgment should be reversed, and a *venire facias de novo* awarded.

*Lancaster.*

HECK  
v.  
SHERRILL.

GIBSON J. If it had been at all necessary to give notice of special matter, it is clear, that the mere circumstance of the party to be affected, having been in fact apprised of the nature of the defence intended to be urged, would not be sufficient to render the evidence admissible. Nothing, but the kind of notice prescribed by the rule of Court can be so; and the rule directs, that it shall be in writing. But it is extremely clear, that in this case, neither pleading nor notice was necessary. The evidence was strictly admissible under the plea of *non assumpsit*, for it went to the consideration, which is the gist of the action. The plaintiff claimed for wages due her for having, during a certain period, performed the duty of house-keeper of the defendant. Is it not competent for him to shew she was guilty of malfeasance as such? that she did not demean herself in the execution of her trust in a faithful manner? and that instead of taking proper care of his house, and the property in it committed to her charge, she had wantonly wasted his goods or clandestinely given them away? *Assumpsit* is an equitable action, and the party claiming performance of the promise, must shew, that every thing is fair and honest on his part. In this case, the consideration of the promise was the performance of a trust;—Shall not the plaintiff be at liberty to shew that the trust, instead of being performed, was violated? Although, I agree, an action might be maintained by the defendant against the plaintiff for embezzling his property, yet, there is nothing in the evidence that looks like defalcation or special matter, not arising out of, but unconnected with, the plaintiff's demand. The case of *Dale v. Sollet*, 4 Burr. 2133, is much stronger in that respect than the present. There the defendant, a ship-broker, had been the plaintiff's agent in suing for a sum of money. He recovered \$000*l.* which he paid over, all but 40*l.* which he retained for his trouble. To an action for money had and received he pleaded the general issue, and offered to prove, that what he retained was a reasonable allowance. It was objected the evidence was not admissible, without a plea of set-off, or at least notice. Lord MANSFIELD, in delivering the opinion of the Court, said, the plaintiff could recover only what he was in equity and conscience entitled to, which could be no more than what remained, after deducting all just allowances out of the very sum demanded; and that it was not in the nature of a *cross demand* or *mutual debt*. Now the

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Lancaster.

HACK  
v.  
SHANKS.

1818. 40/. must have been received to the plaintiff's use, in the first instance, and afterwards appropriated by the defendant to the extinguishment of the debt accruing for the trouble he had been put to in transacting the business, and had less to do with the consideration of the *assumpsit* than the evidence has in the present case.

*Lancaster.*  
HOCK  
v.  
SHEPHERD.

It will be observed, I do not think this evidence admissible as a set-off, but because it was *not* such. If it were ground of set-off there would be an end of the question; for in that case it should have been pleaded, or at least, notice should have been given. It is on this ground, the counsel for the defendant in error, endeavour to shew the propriety of the decision of the Court below;—and it is for this reason, also, I think the case of *Kachlin v. Mulhallon*, 2 *Dall.* 237, is inapplicable. There it was decided, that unliquidated damages could not be set-off, and that the evidence was not admissible, because *there was a good consideration for the bond*, though the defendants had been injured by the subsequent conduct of the plaintiffs. But if the matter had affected the *consideration* of the contract, there is no doubt but by the equitable practice of *Pennsylvania*, it might have been given in evidence under the plea of payment.

I grant that a mere *tort*, unconnected with the plaintiff's conduct as house-keeper, could not have any effect on her claim in that character. But the evidence rejected, went to shew, that during the time she was in the defendant's service, she gave away various articles belonging to him, without his knowledge, and had them carried away from his house to her daughter in *Harrisburg*, to be used by the latter as her own. This was a breach, on her part, of the contract implied by the law, that she would behave herself in the execution of her office or trust with integrity and fidelity. 3 *Com.* 162. It, therefore, appears unjust, that he should be compelled to treat her in the first instance as a person having faithfully executed her trust, and be turned round to an action against her for a breach of her part of the agreement. This unnecessary circuitry ought to be avoided. The merits of the defence can be tried in this form, with as much convenience to the parties as in a separate suit, and the judgment, if pleaded with proper averments, would be a bar to another action for the same cause; and no more danger of surprise can arise from admitting this evidence under the

plea of *non assumpsit*, than happens from evidence of cover-  
 ture, infancy, accord and satisfaction, and a variety of other  
 matters clearly admissible under that plea. The case of *Dun-*  
*lop v. Speer*, 3 Binn. 169, at first view appears not to accord  
 with this doctrine. But that was the case of a man who had  
 the re-payment of money secured to him by the assignment  
 of a judgment. He had also a covenant in an article of  
 agreement for the re-payment of the same money. The  
 Court refused to stay proceedings on the judgment, to give  
 the defendant an opportunity of recovering damages on one  
 of the plaintiff's covenants in the same article, the breach of  
 which was alleged to be misfeasance in his office of founder  
 in the defendant's iron-works. That was a quite different  
 case. The defendant, at most, was not in a better situation  
 than if the plaintiff had sued on the covenant to re-pay the  
 money, and it is very clear, that to a declaration in cove-  
 nant, the defendant cannot plead or give in evidence the  
 breach of another covenant by the plaintiff. The damages  
 expected to be recovered for the misfeasance were a distinct  
 matter, unconnected with the payment of the judgment.

I am aware of a distinction attempted in some of the Eng-  
 lish decisions since the American revolution, between those  
 cases where the defendant has received *some* benefit from the  
 imperfect or negligent performance of the contract on the part  
 of the plaintiff, and those where he has received *none*. That  
 distinction, does not seem to be founded in reason; and those  
 decisions not being authority here, I am not disposed to  
 adopt it. But even if those cases could have any weight on  
 the ground of authority, the law on the subject is by no  
 means settled by them. I cannot find any case in the books  
 directly in point, anterior to the period that British prece-  
 dents ceased to be authority or quotable in the courts of this  
 state. I, therefore, consider the point open to be decided on  
 principle; and am of opinion, the evidence should have gone  
 to the jury. It will be perceived I have considered this case,  
 as if the form of action were *assumpsit*, instead of debt. The  
 act of assembly changing the form of action was not intended,  
 I apprehend, to vary the rules of evidence.

DUNCAN J. The action is debt under the act of assembly,  
 founded on a verbal promise for work and labour by the de-  
 fendant in error, for the plaintiff in error, as house-keeper,

1818.

*Lancaster.*


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 HECK  
 v.  
 SHERMAN.



1818. and for goods sold and delivered. The pleas *non assumpsit* and payment with leave, &c. and *non assumpsit infra annos*.

*Lancaster.*  
HECK  
v.  
SHERRIN.

The defendant below, either under the general issue, or under the plea of payment, with leave, &c. offered to prove that while the plaintiff was in his service for which she demands these wages and payment for the goods sold, she without his knowledge gave various articles belonging to him, and had them sent and carried away from his house to her daughter in *Harrisburg*, to be used by her as her own. This testimony was rejected by the Court, and to this there is an exception.

I am disposed to consider the case as if notice had been given agreeably to the rules of Court, or as if the specification had been waved; it being the same testimony which was given before arbitrators, and on a trial which had proceeded some length when a juror was withdrawn. This was something more than a mere verbal notice. A communication which might be the subject of altercation, what it really was, and on which each party might put his own interpretation; a loose communication making little impression on the mind would not be a compliance with the rule; but two solemn hearings, in the presence of the party and her counsel, would appear to me to be substantial notice. What the witnesses there swore, in case of their death, might be proved by the notes of the counsel, arbitrators, or judges, verified by oath. A rule of Court intended to prevent fraud and surprise on one party, should never be converted into an instrument of fraud and surprise on the other.

But if there had been a formal notice, was the testimony admissible? It is contended by the plaintiff in error, that under the plea of *non assumpsit* every thing may be given in evidence which will destroy the plaintiff's cause of action, as infancy, coverture, release, payment. The reason of this is, either that it disaffirms the contract, or shews performance, or that it ought not to be performed on account of some equity in the defendant. But the evidence offered does neither; it was a matter totally distinct and collateral. Any fraud, failure of consideration in that in which the contract was founded, may be given in evidence in *Pennsylvania*, as in debt a bond under the plea of payment, &c. The rule of Court makes special provision for this; but fraud in another transaction could not. This was the decision in *Jefferies v. Steigleman*, decid-

ed in this Court. The consideration of the note was a quantity of blocks for burr mill-stones ; the evidence offered was a fraudulent misrepresentation of their quality ; the case fell within the very words of the rule of Court. If the evidence offered had relation to the contract, to the performance of the work and labour, as if it had stated negligence by the plaintiff in the duties of her station, another question would have been offered to the consideration of the Court. If it had been offered to prove, that she took the goods and sold them, then the price for which they were sold might, in an action for money had and received, waving the *tort*, have been recovered, or a set-off made to that amount ; so if it had been stated, that they were taken away without the knowledge of the defendant, the value might have been defalked, or considered as a payment,—that the plaintiff received them on account of her services ; but here the charge is purloining and embezzlement of his goods ; it has some marks of larceny in the manner in which the taking and carrying away are stated ; at any rate it was *tort* ; trover or trespass the remedy ; a *tortious* taking, and a wrongful conversion ; the cause of action neither arises *ex contractu* nor *quasi ex contractu*, but clearly *ex delicto* ; not from non-feasance but malfeasance. *Bull. N. P.* 181. A set-off cannot be pleaded to any action on a *tort* whether in trespass or case or replevin, where the avowry is for rent. The attempt to remove the difficulty by considering the opposite demand as originating in the same transaction, and therefore evidence on the plea of payment, does not remove the difficulty ; the right must be reciprocal. An action of trespass or trover and no other could *Heck* bring against the woman for these articles. Could she have resisted or diminished the amount of damages, by proof that he was indebted to her for servants wages ? The answer must be in the negative ; this would form a decisive objection to its admission in this case. The cases in trover are decisive ; the retainer is confined to liens ; where the plaintiff has a lien he may retain in trover as well as in any other action.

In *Green and another v. Farmer and another*, 4 Burr. 2214, the rule is correctly laid down, that no provision of the statute of set-off extends to goods or other specific things wrongfully detained, and therefore neither courts of law nor equity can make the plaintiff, who sues for such goods, pay first what is due to the defendant, except so far as the goods can be

1818. considered as a pledge; and then the right of the plaintiff is  
*Lancaster.* only to reclaim. On this is founded the whole doctrine of  
 HECK liens, that Courts of late years lean so much to; but to  
 v. support the lien there must be an express contract or implied  
 SHENNER. from the usage of trade or the manner of dealing between the  
 parties in a particular case. The general question, says  
 Lord MANSFIELD, is, whether the plaintiff in this action  
 shall be obliged to do justice to the defendants by paying  
 what is due to them before they are entitled to demand  
 the goods from them, and to recover their value in case of  
 refusal.

Natural equity says, the cross demands, should compensate  
 each other, by deducting the lesser from the greater, and that  
 the difference only, is the sum which can be justly due; but  
 positive law, for the sake of forms of proceeding and conveni-  
 ence of trial, has said, that each must sue and recover sepa-  
 rately in separate actions. In *Kachlin v. Mulhallon*, 2 *Dall.* 238,  
 payment to debt on bond with leave, &c.; defendants offered to  
 give in evidence the consideration of the bond, and that it was  
 for a tract of land and mills, which the plaintiff sold to the  
 defendant, reserving a right to swell and raise the water so  
 as not to injure the mills; this was rejected. The clear in-  
 ference from this decision is, that unliquidated damages aris-  
 ing from a covenant connected with a contract, the perform-  
 ance of which is claimed by the action, cannot be given in  
 evidence, either as an equitable defence or by way of set-off,  
 where such damages sound in *tort*, and though the remedy  
 of party might be on the covenant.

In the valuable reports of the late Mr. Justice YEATES,  
 1 *Yeates*, 571, the case is more fully reported; the Court say  
 that the consequence of admitting such evidence would be  
 the blending of the most discordant subjects, matters arising  
*ex contractu* and *ex delicto*.

So in *Switzer v. Garber*, 2 *Dall.* 239, (in the notes,) the ven-  
 dor had interrupted the vendee in the enjoyment of a tract of  
 land which he sold; the vendee was not allowed to give this  
 interruption in evidence, in an action brought for the reco-  
 very of the purchase money, either as an equitable defence  
 or set-off. But I consider the decision in *Dunlop's lessee*  
*v. Speer*, 3 *Binn.* 169, as directly settling this question. On  
 an application to the Court to grant equitable relief on a  
 judgment in ejectment against *A*, to secure the payment of

a sum of money due on articles of agreement which were assigned to secure the money to *B*, and which *A* covenanted to re-pay on a certain day, the Court refused to stay execution on this judgment, to give *A* time to obtain a verdict in consequence of *tortious* acts by *B*, in breach of his covenants in the same articles, though it seems they would if *A*'s claim was for money paid, or any other account susceptible of liquidation. The matter desired to be set-off arose on the same articles in which the party claiming the money, had covenanted to serve *Speer* in the capacity of a founder at his iron-works ; and the deduction claimed was, because he broke his covenant to serve *Speer* faithfully as a founder, by decoying away the servants of *Speer* employed in his iron-works. The Chief Justice observes, that the claims set up by the defendants are acts of non-feasance and misfeasance, such as neglect of duty, and decoying away the servants of the defendant employed in his iron-works, which are incapable of liquidation ; if it was money or any other matter capable of liquidation there would be a strong ground to grant the motion. Justice YEATES observes, in such a case as this the failure of *B* to perform his covenants, such as refusing to fulfil the duties of founder, might be given in evidence under the defalcation act, to diminish his claim ; but I do not consider, that debts arising *ex delicto* for *torts*, such as bad management, as a founder, or the act of enticing away the workmen, can.

It was not a dealing on bond, bill, bargain, promise, account, or the like ; it was a matter of unliquidated damages arising from malfeasance. All dealings between the parties are not subjects of set-off. Could the defendant here have given in evidence a promise of marriage by the plaintiff, and have asked the jury to ascertain the damages on a breach of this promise of marriage, and to strike the balance ? Here the action of the defendant must have been *tort*,—the plea not guilty. But the party is not without his remedy ; there is no necessity to introduce this innovation and confusion of all forms of action ; of distracting the attention of a jury by a variety of unconnected and discordant matter ; *Heck* had an adequate remedy for the injury ; a substantive and distinct cause of action. I cannot distinguish the demand of wages by a house-keeper from the wages of any other servant ; nor can I consider it as any defence by the master, to say you took

1818.

*Lancaster.*


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*HECK*  
*v.*  
*SPEER.*

1818.  
*Lancaster.*  
 Hack  
 v.  
 Sackman.

away and purloined my goods, without my knowledge and against my consent; whether the taking and carrying away would amount to a larceny, or afford an action of trespass or trover for the wrongful and tortious act. *Winchester v. Hackley*, 2 *Cranch*, 343. In an action for money paid and advanced; plea *non assumpsit* and payment. In the account rendered by the plaintiff, he had credited the defendant for the proceeds of certain flour sold by him as defendant's factor; but had afterwards charged the defendant several sums on account of the alleged insolvency of some of the purchasers of the flour. The defendant to repel this evidence, offered to prove that the sums so charged to the defendant, were lost by the *mismanagement and misconduct of the plaintiff*, in having made sales to persons known to him to be unworthy of credit; but the Circuit Court for the district of *Virginia*, refused to permit such proof to be made, being of opinion, that such misconduct was properly to be examined into in a suit for that purpose. In an action by the assignee of a bankrupt, as supercargo of a ship, the defendant cannot set-off a claim against the bankrupt for not keeping the vessel insured according to his undertaking, being unliquidated damages. *Brown v. Cumming*, 2 *Caines*, 33. Now all these cases respected the act of the party in the transaction on which the *assumpsit* was founded.

I am therefore of opinion, the testimony was properly rejected; but differing from the majority of the Court, the judgment must be reversed.

Judgment reversed, and a *venire facias de novo* awarded.

*Saturday,*  
 May 30.

WITMAN against ELY.

ERROR to the Common Pleas of *Berks* county.

It is not necessary, that in all cases a recognisance on an appeal from the award of arbitrators should be in the very words of the act of assembly.

The plaintiff in error, who was also plaintiff below, sold a tract of land to the defendant at auction. The written conditions of the sale were, that the highest bidder should

Juries have no power to alter the contract between the parties, or to substitute one substantially different. A verdict so framed is void.

be the purchaser; that one thousand dollars should be paid in sixty days from the 14th *September*, 1814, which was the day of sale; two thousand dollars on the first day of the following *April*, and the remainder of the purchase money in two equal annual payments after the said first day of *April*, with interest from that day; that the plaintiff's share of the grain to be put out in the fall of 1814, being about eleven acres, should be included in the sale; that the plaintiff should make a good title to the purchaser on the 1st *April*, 1815, should deliver possession on that day, and if it should be required, execute a bond to the purchaser to indemnify him against any claims that might be made on the land. The land was struck off to the defendant at one hundred and thirty-one dollars per acre, and he signed and sealed a paper acknowledging, that he had become the purchaser, at the price and on the terms and conditions above-mentioned.

1818.

*Lancaster.*

WITNESSES  
v.  
JURY.

The first payment of one thousand dollars not having been made at the time stipulated, this action was brought to recover it.

The plea was payment, with leave to give the special matters in evidence.

The cause was submitted to arbitrators, who, on the 14th *March*, 1815, reported in favour of the plaintiff one thousand dollars with interest. The defendant appealed, and entered into a recognisance, conditioned, "that if the plaintiff should in the event of the suit, obtain a judgment for a *sum equal to or greater than* the report of the arbitrators, the defendant should pay all the costs that should accrue in consequence of the appeal, together with the *sum awarded by the arbitrators*, with one dollar per day for each and every day that should be *necessarily* lost to the plaintiff in attending to the appeal." The cause proceeded to trial, and the jury found for the plaintiff one hundred and fifty dollars, with six cents damages and six cents costs, "which sum of one hundred and fifty dollars was allowed by the jury," the verdict stated, "for the violation of the contract; and the plaintiff was to have and retain the right and title to the land with its appurtenances, and was also to have and recover the rents and profits of the same, as if no such sale had been made."

On this finding of the jury, judgment was rendered, to reverse which the present writ of error was brought.

1818. The errors assigned were, *First*, That the recognisance  
*Lancaster.* was not in the form prescribed by the act of assembly.  
*WITMAN* *Secondly*, That the jury had not passed on the issue joined,  
*v.* and that the finding was so uncertain and repugnant, that no  
*Exr.* judgment could be entered on it.

*Hopkins*, for the plaintiff in error, contended, that the 14th section of the act of 20th March, 1810.(a) having prescribed the form of the recognisance into which the defendant must enter, on appealing from an award of arbitrators, the omission of the words, "or judgment as or more favourable than the report of the arbitrators," and of the words, "or value of the property or thing," and the introduction of the word, "necessarily," before the words, "lost by the plaintiff in attending to such appeal," were fatal to this recognisance, and made the subsequent proceedings in the Court below *coram non judice*.

On the second point he insisted, that the verdict was void, because the plea of payment had admitted the contract; and the verdict avoided it and substituted a new one in place of it, which could not be done. *Tonkin v. Croker.*(b) *Wilcox v. Skipwith.*(c)

*Evans* and *C. Smith*, for the defendant in error, answered, that the recognisance pursued the act of assembly in every thing material, and that was enough.

As to the verdict, they said it was substantially good. The action was debt for one thousand dollars, and the verdict was for one hundred and fifty dollars. The old law, that in debt the verdict must be for exactly the sum demanded, has long been exploded. The verdict for one hundred and fifty dollars debt, with six cents damages and six cents costs, would have been strictly good, if it had stopt there. All that is added is immaterial and nugatory, and should be rejected as surplusage. *Pepy's case.*(d) 7 Bac. Ab. 20. *Verdict.* But admitting the whole verdict to be material, it might be supported under the practice of *Pennsylvania*, in whose Courts common law and chancery powers are blended. Chancery cancels contracts founded in fraud, and enforces fair contracts; sometimes it takes a

(a) *Purd. Dig* 15.

(b) 2 *Ld. Ray.* 864.

(c) 2 *Mod.* 5.

(d) 3 *Leon.* 80.

middle course, and does equity on the whole matter. In 1818. *Pennsylvania*, judgments are often rendered upon condition in order to do equity. In actions by vendee against vendor it is usual to give such damages as will insure a compliance with the contract, which are released on the vendor's giving a conveyance. So if the vendor brings an ejectment, part of the purchase money being paid, the Court will take care, that if the residue be paid, the land shall be given up to the vendee. In this case the jury thought the contract ought not to be carried into effect; and yet that the defendant had so conducted himself, that he ought to pay damages. They, therefore, did equity between the parties, on a view of the whole case. *Lancaster.*  
WITMAN  
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Mr. *Hopkins* was about to reply, but was stopt by the Court, the opinion of which was delivered by

DUNCAN J. The act regulating arbitrations of the 20th March, 1810, 5 Sm. L. 189, prescribes the form of a recognisance, the condition of which is, when entered into by the defendant, that if the plaintiff in the suit shall obtain a judgment as or more favourable than the report of the arbitrators, the defendant shall pay the costs that may accrue in consequence of such appeal, together with the sum or value of the property or thing awarded, with one dollar per day for each and every day that shall be lost by the plaintiff in attending to such appeal.

Two objections are made to this recognisance. First, that it omits the part of the condition respecting the value of the property or thing awarded, and secondly, that it adds the word *necessarily*, to the attendance of the plaintiff on the appeal. This was an action of debt for a sum of money; the award was for a sum of money. To pay the sum awarded was in such case the proper form. The words, "or value of the thing or property awarded," relate to suits brought to recover the value of some property, of the violation of the right to which, the plaintiff complains. The recognisance to meet that case naturally requires, that the words, "or the value of the thing or property awarded," should be inserted. The clause is in the disjunctive, and is to be construed with reference to the nature of the action, whether for money, or for the value of the thing or property awarded.



1818. The word "necessarily," is implied by the law. The ap-  
*Lancaster.* pellee is only entitled to an allowance for the time he neces-  
 WITMAN sarily attended, and the Court in taxing the bill of costs,  
 v. ELL would ascertain what time he did necessarily attend.

This recognisance being in direct conformity to the act, it is deemed unnecessary to give an opinion how far the acts of the plaintiff in going on to trial, would amount to a waiver of irregularity in entering the appeal. The subsequent proceedings never can be considered as a mere nullity; an usurpation of jurisdiction by the Court of Common Pleas; for after an award filed, and judgment rendered, if such award is defective in its form, the Court has jurisdiction over it, and can set it aside.

But the objection to the verdict is more substantial. It has been endeavoured to answer it by contending, that after the general finding of one hundred and fifty dollars, with six cents damages and six cents costs, all that follows is surplussage and ought to be rejected, and if this be not so, then, that the verdict is sanctioned by the powers necessarily inherent in juries, from a want of a court of chancery in *Pennsylvania*, to grant relief on equitable terms. To consider this surplussage and reject it, would not be moulding a verdict according to the justice of the case, and the intention of the jury. It would be contrary to their intention and manifestly unjust; for if this verdict were to remain as a naked verdict for one hundred and fifty dollars, the defendant could compel the execution of the contract in ejectment, on the trial of which this verdict would be conclusive on *Witman*, as to the thousand dollars; that it had been paid and satisfied. It must be considered as a special finding; a special decree of the jury, rescinding the contract on terms not made by the parties, but by the jury.

Much has been said, with regard to the powers of a court of equity, and the power of juries in *Pennsylvania*. But a court of chancery have no more power than a court of law, to absolve parties from their contracts. Courts of chancery may remain neuter, when there are such circumstances attending the transaction, as to shew that it would be iniquitous to compel a specific execution; as fraud, misrepresentation, gross inequality or inadequacy, such as would shew from its own extravagance, an imposition, an undue advantage, *suppressio veri*, or *suggestio falsi*, or where the title is

defective, or the party discovered a backwardness. *Mills v. Edwards*, 1 Vern. 159. It is believed, that where the agreement is binding in law, and none of the circumstances stated exist, chancery never has refused to compel a specific execution. Where the terms of the contract are doubtful, or where there is a prior agreement to convey land, chancery has referred the matter to a court of law, to be considered, whether damages could be there recovered, and then the chancellor will be governed by the result, for chancery cannot contradict or overturn the grounds and principles of law. Chancery cannot dissolve a legal contract, on terms. This Court cannot say to a party who repents of his contract, we will let you off on terms; for if the contracting parties stipulate for such event, and insert in a contract for sale, that if either party break the agreement, he shall pay a sum of money to the other, this will only be considered in the nature of a penalty, and consequently a specific performance will be decreed in the same manner as if no such provision had been inserted; and although the defendant may wish to forfeit the penalty, yet a specific performance will be decreed. *Howard v. Hopkins*, 2 Atk. 371. Sugd. 155. It would be otherwise where the sum was fixed by the parties as stipulated damages for non-performance. These I consider to be binding rules in equity: The discretion vested in that Court is not unlimited, precarious, or undefined. That discretion is a science not to act arbitrarily according to men's wills and private affections, but is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to become subservient to the other. In some cases this discretion follows the law, in others it relieves against its abuse or allays its rigour, but in no case does it contradict or overturn the grounds and principles thereof, as some have ignorantly imputed to it. That is a discretionary power which neither this nor any other Court, not even the highest, acting in a judicial capacity, is by the constitution intrusted with. By Sir J. Jekyll, master of the rolls, in *Cowper v. Cowper*, 2 P. Wms. 753. Discretion without rule ceases to be law, and becomes a most dangerous and tremendous power. When applied to a court of justice, it means a sound discretion guided by law; it must be governed by rule and not by humour; it must not be arbitrary, vague and fanciful, but legal and regular. *Rex v. Wilkes*, 3 Burr. 2539.

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1818. Principles of decisions adopted by equity, when fully established and made the ground of subsequent decisions, are considered by these Courts as rules to be observed with as much strictness as positive law. *Mif. Ch. 4.* And in cases of fraud, which from their nature, must be almost infinitely various in their circumstances, courts of equity constantly proceed upon some clear and established principle, sufficiently comprehensive to meet the circumstances of the particular case to which it is applied, and not upon any vague, arbitrary, and indefinite power, which in its exercise might indeed prove mischievous to the individual, and alarming to the state. 1 *Fonb.* 24. To leave all rules of property to the reason of those who are to decide is, however in theory excellent, in practice is dangerous. No man who is not a lawyer, would know how to act, and no man who is a lawyer would know how to advise, unless all judicial tribunals were bound by authority. *Jones on Bail*, 46.

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*WITMAN*

*v.*  
*ELY.*

It is not the law of *Pennsylvania*, that juries may exercise, without the controul of the Court, all equitable powers, without regard to any rule, according to their own reason and discretion, in every particular case. Instead of being decisions of the law, they would be arbitrary decrees in the nature of awards, suddenly made *pro hac vice*. If this were the case, there is no intelligent man but must discover the consequences. In every Court, for every Term, there would be as many chancellors, as there were jurors drawn from the box. How unequal would be the distribution of justice? There would cease to be any common rule in law; as many different rules would prevail as there are counties in the state, and even in the same Court the rule would be fluctuating. But to this reproach the administration of justice in *Pennsylvania* is not subject; for though there are difficulties to encounter in the exercise of chancery powers in courts of common law, conflicting and various interests, difficult to adjust, because there are no means of bringing all the parties before the Court, yet in the exercise of these equitable powers, Courts and juries are as much bound by equitable rules as by the positive precepts of the law. The ascertainment of the facts on which the equity of the Court is called on to interpose, must be decided by the jury, but the mode, manner, and extent of the relief, are questions of law to be decided by the Court; thus preserving the line of distinction

between the province of the Court and that of the jury. Chief Justice SHIPPEN, in *Shewell v. Fell*, 3 *Teates*, 21, observes, *Lancaster*. 1818.

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that it is the province of the Court to judge in what cases the rules of the English common law should be relaxed. Should juries assume this power, the necessary consequence would be, that the utmost uncertainty must ensue from the fluctuating opinions of different sets of jurors in different counties. This opinion, proceeding from a Judge of great experience, and who must have observed, from a very early period, the progress of the exercise of equity powers in our courts of common law, is of great authority, and was sanctioned by the opinion of the whole Court.

One great object of society is, a power to enforce the performance of contracts. This is the chief business of courts of civil jurisdiction. So important is this deemed, that the framers of the constitution of the *United States* and of this state, have prohibited the legislature from passing any laws impairing the obligation of contracts. It would be inconsistent to suppose, that this power, which was prohibited to the legislature, should be vested, in every contract, in twelve men chosen by lot.

When chancery interposes, it sets aside the contract, because it is infected with some of the ingredients before stated. It considers the contract as not binding, but it never makes a new contract, nor lets the party off on paying a compensation for the violation of a binding contract, fair and equal, and which does not stand impeached in any way.

It is admitted, however, that juries may, under particular circumstances of hardship, inequality, and oppression, find a very small sum in damages, and that chancery would not carry a contract so obtained into specific execution. If this had been a general verdict for one hundred and fifty dollars, this Court would not have reversed it, as they have no power to grant a new trial; but, I consider this finding of the jury in the nature of a special verdict, or equitable decree, by which it may be inferred, that the contract itself stood unimpeached, and that the jury dissolved the contract, and let the party off from a bargain of which he had repented, on paying one hundred and fifty dollars composition money. On such special verdict the Court could not give judgment to carry it into effect and execution; and if there were any facts which would shew, that such circumstances attended the

1818. transaction, as that it would be against the rules of equity to  
*Lancaster.* carry it into effect, these facts ought to have been found,  
WITMAN and therefore, the verdict is imperfect. I am, therefore, of  
v.  
ELY. opinion, that the judgment should be reversed, and a *venire*  
*facias de novo* awarded.

Judgment reversed, and a *venire facias*  
*de novo* awarded.

END OF MAY TERM, 1818.

# CASES

IN THE

## SUPREME COURT

OF

### PENNSYLVANIA.

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MIDDLE DISTRICT, JUNE TERM, 1818.

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LOVE *against* BARTON.

1818.

Sunday.

IN ERROR.

*Wednesday,*  
June 3.

WRIT of error to the Court of Common Pleas of *Columbia* county.

The 29d section of the act of 20th March, 1810, which declares, that the judgment of the Court of Common Pleas shall be final on all proceedings removed by *certiorari*, from before justices of the peace, and that no writ of error shall issue thereon, is confined to *certioraris* issued under it, and does not extend to a case which was removed prior to the act.

This suit was originally brought before a justice of the peace of *Northumberland* county. From the entries in his docket it appeared, that on the 9th *February*, 1801, a summons issued against the defendant, the plaintiff in error, for a debt under five pounds, and that on the return of the process the parties appeared, when the justice gave judgment for the plaintiff for 1*l.* 4*s.* 4*d.* On the 9th *March*, 1801, the suit was removed by *certiorari* to the Common Pleas of *Northumberland* county, of which *Columbia* county then formed a part. The proceedings of the magistrate were confirmed in the Court below, and the record brought to this Court by writ of error.

*Marr* and *Fricke*, for the defendant in error, now moved

Before the act of 20th March, 1810, it was not necessary, that the cause of action should be entered in the docket of a justice of the peace. If it appeared, that the case was within his jurisdiction, it was enough.

1818. to quash the writ, because the decision of the justice had  
*Sanbury.* been removed to the Common Pleas by *certiorari*, in which  
case a writ of error is forbidden to be sued out by the 22d  
section of the act of the 20th *March*, 1810.(a)  
*LOVE*  
*v.*  
*BARTON.*

*Bellas*, contra, answered, that as this cause had been removed before the passage of the act, it was not within its provisions.

By THE COURT. The act of assembly is confined to *certioraris* issued under it, and therefore does not embrace this case.

Motion to quash the writ dismissed.

*Bellas*, then contended, that there was error in the judgment of the Court of Common Pleas, because there was nothing on the record to shew, for what cause the action was brought, but

By THE COURT. This was a proceeding before the act of 20th *March*, 1810, which requires the cause of action, (whether bond, account, &c.) to be entered on the justice's docket, and therefore not subject to the provisions of that act. Enough appears on this record to shew, that it was within the justice's jurisdiction, viz. a debt under five pounds. This we think is sufficient, and therefore the judgment should be affirmed.

Judgment affirmed.

(a) 5 Sm. L. 171.

1818.

Sunbury.THOMAS *against* CULP.

IN ERROR.

Saturday,  
June 6.

THIS was an ejectment in the Common Pleas of *Columbia* county. The writ described the land, as "situate in *Briar creek* township, in the county aforesaid, containing 32 acres 47 perches, being part of a tract of land surveyed in the name of *John Hoofnagle*, bounded by lands surveyed for *Robert Glen*, and adjoining *Briar creek*." The plaintiff in pursuance of the act of assembly of 21st March, 1806, filed a statement, containing a description of the land as follows:—"A certain piece or parcel of land, situate below and adjoining *Briar creek* township, *Columbia* county, containing 40 acres, be the same more or less, being part of a tract of land surveyed in the name of *John Hoofnagle*, and bounded by lands surveyed in the name of *Robert Glen*." The defendant pleaded not guilty. The cause was tried, and the plaintiff obtained a verdict in the Court below. The errors now assigned were, that the description was too uncertain, and that there was a variance in the description, between the writ and the statement.

A variance in the description between the writ and the statement filed in an ejectment, under the act of 21st March, 1806, is cured by verdict.

What is a sufficient description of the land under that act.

*Watts*, for the plaintiff in error.

*Hall* and *Greenough*, for the defendant in error.

The opinion of the Court was delivered by

TILGHMAN C. J. There certainly is a variance, which might have been taken advantage of, if the objection had been made in due time; but after verdict it is cured by the statute 5 Geo. I. ch. 13, extended to this state, by the report of the Judges of the Supreme Court. This statute enacts, that after verdict, the judgment shall not be stayed or reversed, for any defect or fault either in form or substance, in any bill, writ, original or judicial, or for any variance in such writ from the declaration or other proceedings. The only question then, will be, whether the statement contains a sufficient description of the land recovered. I think it does. For we have a designation of the whole tract, of which this is a part,



1818. the quantity of land demanded, and the name of the adjoining tract. It is also said, to lie below, and adjoining *Briar creek* township. From all this, the land for which the suit is brought, appears with sufficient certainty. I am, therefore, of opinion, that the judgment should be affirmed.

*Saturday.*

THOMAS  
v.  
COLE.

Judgment affirmed.

### EVANS against The Commonwealth.

4:272  
165 166

*Saturday,*  
June 6.

IN ERROR.

The certificate of the acknowledgment of a deed by a married woman for the conveyance of her lands under the act of 24th February, 1770, ought to state substantially, that she was separately examined, that she had a knowledge of the nature and consequences of the act she was about to perform, and that her will in the performance of it was free.

Therefore, a certificate merely stating, that she was of full age, and separately and apart examined, and the contents of the deed made known to her, without mentioning, that she voluntarily consented to the execution of it, is insufficient.

THE plaintiff brought an action against the Commonwealth in the Court of Common Pleas of *Luzerne* county, for compensation under the act for offering compensation to the *Pennsylvania* claimants of lands within the seventeen townships of *Luzerne* county, passed the 4th April, 1799, and its supplements, for certain lands certified to *Connecticut* claimants under the provisions of that act. For the purpose of deriving title under *Pennsylvania* to the land for which he claimed compensation, he proved that a patent was issued to *Edward Lynch*; that *Lynch* conveyed to *James Guest*; that *Guest* died, leaving a son named *Thomas*, and a daughter named *Anne*, who intermarried with *Robert Coe*, and that afterwards, on the 18th December, 1812, *Thomas Guest* and *Robert Coe* and *Anne* his wife, by indenture, conveyed the premises to the plaintiff. The deed was acknowledged before a Judge of the Common Pleas of *Philadelphia* county, whose certificate was in the following form: "This 29th day of *September*, Anno 1813, before me, *John Geyer*, &c. came *Thomas Guest*, *Robert Coe*, and *Anne* his wife, and acknowledged the above instrument of writing to be their act and deed, and desired, that it may be recorded as such; the said *Anne* being of full age, and separately and apart examined, and the contents thereof made known to her. Witness," &c. The above facts being found by a special verdict, the Court gave judgment for the plaintiff for the moiety claimed under the title derived from *Thomas Guest*, and as to the moiety claimed in right of *Robert Coe*

and *Anne* his wife, they were of opinion, that the acknowledgment found by the jury did not substantially conform to the requisitions of the act of assembly of the 24th February, 1770, and therefore did not divest her of the estate. As respects this moiety, therefore, judgment was given for the defendant, and the cause was removed by writ of error to this Court, where it was argued by

1818.

*Sunbury.*

EVANS

v.  
The Commonwealth.

*Hall*, for the plaintiff in error, who cited *Watson's lessee v. Bailey.*(a) *Kirk v. Dean.*(b) *M<sup>c</sup>Intire's lessee v. Ward.*(c) *Shaller v. Brand.*(d)

*Huston*, for the defendant in error.

TILGHMAN C. J. did not hear the argument and gave no opinion.

The opinion of the Court was delivered by

GIBSON J. The single question for our decision is, whether the deed, as acknowledged, be sufficient to pass the estate of *Anne Coe* in the land conveyed; and I am decidedly of opinion it is not. *Watson v. Bailey* is the leading case on the subject, and from the principles established by it, I am unwilling to depart. It was there decided, that the substantial requisites by which the interests of married women were intended to be protected, should appear on the face of the certificate of acknowledgment to have been pursued. What are these requisites? The legislature intended, that a married woman, in conveying her estate, should be a free agent, and that she should be secure from deception as well as improper influence on the part of her husband. I therefore take those requisites to be, that she be separately examined, that she have a knowledge of the nature and consequences of the act she is about to perform, and that her will in the performance of it, be free. I know it is supposed by many of the profession, that in *M<sup>c</sup>Intire v. Ward*, this Court receded from its decision in *Watson v. Bailey*. It did not recede. There the objection was, that it did not appear the contents of the deed had been made known to Mrs. *Neil* by the magistrates who took the acknowledgment. The Chief Justice, in deli-

(a) 1 Binn. 470.

(b) 2 Binn. 341.

(c) 5 Binn. 296.

(d) 6 Binn. 435.

1818. vering his opinion, stated he did not consider it as having  
*Sunbury.* been decided in *Watson v. Bailey*, that it was necessary it  
 should appear the contents had been made known to the wife,  
*EVANS* nor did he then intend to express an opinion on that point;  
*v.* but that if it were necessary, it appeared substantially from  
*The Commonwealth.* the special nature of the certificate that Mrs. Neil was fully ap-  
 prised of the contents of the deed. Justice YEATES gave no  
 opinion; and Justice BRACKENRIDGE was decidedly of opi-  
 nion, that under the authority of *Watson v. Bailey*, communi-  
 cation of the contents ought substantially to appear, as also,  
 that the execution of the deed was voluntary and without  
 coercion; and as to that, I heartily concur with him. But  
 it never could be suspected from any thing that has fallen  
 from this Court, that we held it unnecessary to set forth in  
 substance, that the wife executed the deed voluntarily and  
 without the compulsion of her husband. In *Shaller v. Brand*  
 it was held, that the words, "she voluntarily consenting  
 thereto," sufficiently indicated her assent to the *execution of*  
*the deed*, and not, as was contended, to her being separately  
 examined; but the Court again decided, that the very letter  
 of the act need not be pursued, but that it must appear to  
 have been substantially complied with. But if the form of  
 acknowledgment in the present instance should be held good,  
 it would be better to over-rule the case of *Watson v. Bailey*  
 at once. To presume that every thing was rightly and solemnly  
 transacted before the magistrate, would be to dispense with  
 every guard against the coercion and improper influence of  
 the husband, which the law has interposed for the protection  
 of the wife. Why not as well dispense with the separate  
 examination altogether? We know how rapidly and with  
 what little consideration of their importance, these matters  
 are usually transacted before magistrates. A certificate, well  
 drawn by the scrivener, would suggest to the magistrate, who  
 should read it before signing, some matters of duty on the  
 occasion, that otherwise might escape his attention. Even  
 this is a matter of consequence, that pleads for retaining a  
 form of certificate setting forth specially a substantial com-  
 pliance with the requisites of the law. As it does not appear  
 the wife declared that she executed the deed voluntarily, I  
 am of opinion that the judgment be affirmed.

Judgment affirmed.

1818.

Sunbury.

The Commonwealth *against* The Sheriff and Keeper of  
the Jail of Northumberland county.

Friday,  
June 13.

ON a *habeas corpus* directing them to produce the body of *Jeremiah Fullerson*, the defendants returned, that they detained him by virtue of an execution in a civil suit issued by *Andrew Albright*, styling himself a justice of the peace of the county of *Northumberland*. It appeared, that *Mr. Albright* had received a commission dated 22d *June*, 1809, as a justice of the peace in district No. 1. called the district of *Augusta*; that the township of *Augusta* was divided in *November*, 1803, when the borough of *Sunbury*, which before had formed a part of the township, was erected into a separate township, and that *Mr. Albright* had never resided in *Augusta* township, but had constantly resided in *Sunbury*. It also appeared, that on the 7th *September*, 1813, *Mr. Albright* had accepted a commission as associate judge of the Court of Common Pleas of *Northumberland* county. On these grounds it was contended by *Watts*, on behalf of the prisoner, that the commitment was void; that *Mr. Albright* was not *de jure* a justice of the peace, and that all the proceedings were *coram non judice*.

The division of a township does not vacate the commissions of the justices of the peace of the district.

The offices of justice of the peace and associate judge of the Court of Common Pleas are not incompatible with each other.

*Bradford* contra.

The opinion of the Court was delivered by

DUNCAN J. The constitution empowers the governor to appoint a competent number of justices of the peace, in such convenient districts as are or shall be directed by law. By the constitution of 1776, the state was to be divided into districts for the election of justices, which were to remain until altered by law.

The district of *Augusta*, under the present constitution, was constituted a district for this purpose by the commissioners of the county in *October*, 1803; and at *November* sessions 1803, this district of the county was entered of record. This district included the borough of *Sunbury*, in which *Andrew Albright* resided at the time of his appointment, and always continued to reside. By the act of assembly of 22d

1818. *February, 1802*, 3 Sm. L. 490, it is provided, that no justice of the peace shall act as such, unless he shall reside in the district for which he was appointed.

*Sunbury.*

The Commonwealth  
v.

The Sheriff  
and Keeper of  
the Jail of  
Northumberland  
county.

The division of a township would not vacate the commissions of justices of the peace of the district; it is believed such never has been the construction of this article of the constitution; nor has it been the course in such case to issue new commissions. If it were so, the smallest alteration in the boundaries would vacate all appointments. Judicial districts have been changed, counties have been added to and taken from them; yet new commissions have never been issued to the Presidents. The district No. 1. *Augusta*, including *Sunbury*, still remains a district, for this purpose unchanged. *Andrew Albright* is duly commissioned a justice of the peace for the district including *Sunbury*, his place of residence. But another objection is made; it appears, that *Andrew Albright* was commissioned an associate judge of the Court of Common Pleas of *Northumberland* county on the 7th *September*, 1813, and continued to act as such until *January* last, when he resigned that commission; and it is contended, that the acceptance of this commission vacated his commission as a justice of the peace. The duties of these offices are said to be incompatible, as the Judge may be called on to give judgment in the Common Pleas, on a judgment rendered by himself as a justice of the peace. It is true, that where the offices are incompatible, the acceptance of the last amounts to a surrender of the first. I wave a preliminary question, how far on a *habeas corpus* this can be inquired into, and whether judicial acts by one, *de facto* a justice, holding and exercising the office, not under mere colour of right, but possessing a commission on its face constitutional and legal, are void; and whether the Court, where the person claiming to hold office and actually exercising it is not before the Court, can decide on his right. The natural course would be by information filed, calling on him to shew cause, why he claimed to hold the office, but that would not lie here, as this Court has no original jurisdiction beyond the city and county of *Philadelphia*; but an action for the false imprisonment would lie against him, in which case the legality of his commission would come in question and meet a regular decision; but waving all these inquiries, the Court have

judged it most advisable not to leave the main question in doubt, and now proceed to give their opinion on it. 1818.

*Sunbury.*

The Commonwealth  
v.

The Sheriff  
and Keeper of  
the Jail of  
Northumber-  
land county.

At the common law, offices subordinate and interfering with each other have been considered incompatible, as where one officer is judicial and the other ministerial, and the ministerial officer is directly subordinate to the judicial. Hence it is, that the Chief Justice of the King's Bench cannot be a prothonotary or clerk of the peace, 4 *Inst.* 100; nor a forester be a justice in eyre in the same forest, because the forester is under the correction of the justice in eyre, and he cannot judge himself, 3 *Inst.* 310; but a justice of the Common Pleas, may be baron of the exchequer, 4 *Com. Dig. Office. B.* 7.; and the Chief Justice of the King's Bench being made keeper of the great seal, continues Chief Justice. *Cro. Car.* 600. *Sid.* 338. Sir EDWARD LITTLETON, Chief Justice of the Common Pleas, being appointed lord keeper, continued to act as Chief Justice. Lord HARDWICKE for some time acted both as Chief Justice and Chancellor, and yet the Chancellor sends issues to be tried in the King's Bench or Common Pleas; and cases are sent by the Chancellor to these Courts for their opinion; and in cases of great importance he calls to his assistance members both of the King's Bench and the Common Pleas. So, antecedent to the present constitution, justices of the peace were justices of the Court of Quarter Sessions, from whose decisions appeals lay to that Court, as appeals on orders of removal. So they were generally appointed Judges of the Common Pleas, and yet as justices they had civil jurisdiction from the exercise of which appeals lay to the Common Pleas. Under the constitution of 1776, justices of the peace were elected by the freeholders of the district, and commissioned by the executive council; but the appointment of Judges of the Common Pleas was by the council alone. A Judge of the Common Pleas was not necessarily to be taken from the justices elected by the freeholders; yet generally they were. One instance occurs to the recollection of the Court, though there may be many others, where this was not the case; the late Chief Justice of this Court was appointed President of the Common Pleas of the city and county of *Philadelphia*, and he never had been elected a justice of the peace. These justices of the peace were members of a Court who decided on appeals

1818. from justices of the peace. Here was the same incompatibility, if incompatibility it be, as in this case.

*Sunbury.*

The Commonwealth  
v.  
The Sheriff  
and Keeper of  
the Jail of  
Northumber-  
land county.

By the present constitution, the judicial power is vested in the Supreme Court, in Courts of Oyer and Terminer and General Gaol Delivery, Common Pleas, Orphan's Court, Register's Courts, and Courts of Quarter Sessions, and such other Courts as the legislature might from time to time establish. The Courts were organised by act of 13th *April*, 1791. The Judges of the Supreme Court, the Presidents of the Courts of Common Pleas, &c. were constituted Judges of the High Court of Errors and Appeals. It is true, that such of these Judges and Presidents as had given judgments in any cause were excluded from sitting in judgment in that cause; but in causes decided by the associate judges of the Common Pleas, where the President did not sit in judgment, his voice as a member of the High Court of Errors and Appeals might reverse the judgment of the Supreme Court, reversing the judgment of that Court of which he was President, and thus affirm the judgment of his own Court.

It is not for this Court to decide on the propriety of such appointments, or the inconvenience; the inquiry is confined to incompatibility, created by the constitution or by some law. These appointments do not appear to this Court to be inherently incompatible at common law. Nor are they repugnant to the provisions of the constitution or any act of assembly. If evils arise from this union of commissions in the same person, this Court has not the power to remove the evil; the power resides elsewhere.

Prisoner remanded.

1818.

Sunbury.

MOORE administrator of MOORE against MILLER.

IN ERROR.

Saturday,  
June 13.

THE plaintiff in error brought an action against the defendant in the Common Pleas of *Union* county, on an award in writing, and the Court left it to the jury to determine what was the meaning of the arbitrators, which *Marr* contended was error.

It is error for the Court to leave it to the jury to determine the construction of an award in writing.

*Bradford*, for the defendant in error.

By THE COURT. The Judge, after expressing his own opinion on the construction of the award, left it to the jury to determine *what was the intention of the referees*. This was error. The jury should have been told what was the legal import of the award, and upon that point nothing should have been left to them, because it was a pure unmixed matter of law. The judgment, therefore, must be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

LYONS against MILLER and another.

IN ERROR.

Saturday,  
June 13.

ON the return of a writ of error to the Court of Common Pleas of *Union* county, it appeared, that this was an action of ejectment brought to *April* Term, 1810, by *Peter Miller* and *Adam Wilt*, the defendants in error, against *Samuel Lyons*, for "a tract of land situate in \_\_\_\_\_ township, in the county aforesaid, containing 200 acres or thereabouts, bounded by other lands in possession of said \_\_\_\_\_"

After issue joined in an action of ejectment, in the form prescribed by the act of 21st March, 1806, it is too late to plead, that in the description filed, the name of the township

in which the land lies, is omitted. This is a matter which should be pleaded in abatement. What is a sufficient description of the land, agreeably to the act of 21st March, 1806.



1818.  
*Sanbury*  
 LEONS  
 v.  
 MILLER  
 and another.

*Samuel and Jack's* mountain, being part of a larger tract of 400 acres which was in dispute between the said *Samuel* and *James Miller*, before the board of property on the 2d October, 1809." The defendant appeared on the return of the writ, pleaded not guilty, and issue was joined. The cause did not come to trial until *February*, 1816, when, after the jury were called and about to be sworn, the defendant moved the Court to quash the writ, because the township in which the land lay was omitted, contrary to the form of the act of assembly of 21st *March*, 1806. The Court rejected the motion, the trial was had, and a verdict found for the plaintiffs. The defendant then removed the cause by writ of error to this Court.

After argument by *Bradford*, for the plaintiff in error, and by *Hall*, for the defendants in error,

The opinion of the Court was delivered by

TILGHMAN C. J. It is assigned for error, that the act of assembly which prescribes the form of the writ of ejectment, directs the township to be mentioned. It does so, and had this matter been pleaded in abatement, the plea would have been good. But can the defendant plead it, after issue joined, and especially after the cause has been six years depending? It is contended, that he can, because the same act of assembly (sect. 6.) enacts, that the plaintiff may amend his declaration, or the defendant amend or alter his plea, at any time before or even during the trial. There is no doubt, but the Court may permit the defendant to alter his plea, if the merits of his case require it. But to say, that this act of assembly, which was manifestly intended to promote justice, and to prevent the sacrifice of substance to form, should be so construed as to uphold form at the expense of substance, would be to defeat its object, and convert that into a mischief which was designed for a remedy. It was not meant to subvert the whole system of pleading, founded on the wisest considerations. A plea in abatement, upon matter of form, should be put in soon after the defendant's appearance, in order that the plaintiff may have an opportunity of renewing his action as soon as possible. But to plead to the merits is, in effect, to waive all objections to the form of the writ, and therefore the defendant should not be permitted to recur afterwards to formal objections. The act of assembly leaves

it to the discretion of the Court, whether or not to admit an alteration of the pleadings; I mean their legal discretion, founded on good reason. They are not obliged to encourage vexation and delay, by permitting the defendant to abate the plaintiff's writ, for a matter of form, after amusing him with the shew of going to trial on the merits. This principle was lately established by us at *Lancaster*, in the case of *Wilson v. Hamilton*, (*ante* 238,) where the defendant having passed over his time for putting in a plea of the plaintiff's coverture pending the action, (a matter which should be pleaded *puis darrien continuance*,) moved the Court for permission to make the plea during the trial. The motion was rejected, and the judgment affirmed on a writ of error. The Court were right, therefore, in refusing to quash the writ; and the only question is, whether the description of the land for which the ejectment is brought, be sufficiently certain to support the judgment, though the township is omitted. Without doubt it is certain enough; it names the county, and the quantity, and describes the adjoining lands, by which this tract is bounded. That is sufficient. I am, therefore, of opinion, that the judgment should be affirmed.

1818.  
*Sunbury.*  
LYONS  
v.  
MILLER  
and another.

Judgment affirmed.

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{ DAILEY and others *against* AVERY.

IN ERROR.

Thursday,  
June 18.

WRIT of error to the Court of Common Pleas of *Luzerne* county.

*Cyrus Avery*, the plaintiff below, claimed title to the land for which this ejectment was brought under *Zebulon Marcey*, who, on an application for 300 acres, obtained a certificate for 337 acres from the commissioners appointed to carry into effect the act of assembly, entitled, "An act for offering compensation to the *Pennsylvania* claimants of certain lands within the seventeen townships of *Luzerne*," &c. passed on the 4th April, 1799, and its supplements, passed the 15th

Between  
Connecticut  
claimants of  
lands within  
the seventeen  
townships of  
*Luzerne*, under  
the act of  
4th April,  
1799, and its  
supplements,  
the certificate  
of the commis-  
sioners is con-  
clusive evi-  
dence of title.

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1818. *March*, 1800, and 6th *April*, 1803. The certificate bore date the 21st *January*, 1804, and a patent issued on it to *Sunbury*. *Marcey*, on the 17th *November*, 1812. By deed bearing date *DAILEY* *Marcey*, on the 17th *November*, 1812. By deed bearing date *v.* *December* 10, 1812, *Zebulon Marcey* and wife conveyed to *AVERY*. *Cyrus Avery*.

The plaintiff having made out his title, the defendants offered to prove, that neither *Zebulon Marcey* nor any person under whom he derived title had ever been settled on the land in dispute, and that there was no settlement or occupancy of the said land prior to the decree of *Trenton*. They offered to prove also, that their father, *David Dailey*, settled upon this land upwards of thirty years ago; that he and his family had actually resided on it ever since, and that no person, except the said *David Dailey* and his children, (the defendants,) had ever occupied or improved the said land. They further offered to give evidence of the value of the improvements made by their father and themselves. To all this evidence the plaintiff objected, and in order to shew that it ought not to be received, he proved, that the said *David Dailey* had entered an application for this land in the land office of *Pennsylvania* on the 19th *Dec.* 1800, claiming it as a *Connecticut settler*, and engaging to submit to and abide by the determination of the commissioners respecting the same. The Court of Common Pleas rejected the evidence, and the defendants excepted to their opinion. An exception was also taken to the opinion of the Court in their charge to the jury. They were requested by the defendant's counsel to instruct the jury, that as the application was only for 300 acres, the plaintiff could recover no more, though the certificate issued for 337 acres. The Court gave it, however, as their opinion, that the certificate having issued for 337 acres, and the Commonwealth having confirmed the same by patent, the plaintiff, if he otherwise made out his case, was entitled to recover the whole quantity.

*Hall and Watts*, for the plaintiffs in error. By the act of 4th *April*, 1799, sect. 5, (a) the jurisdiction of the commissioners is confined to cases of "rights or lots within the seventeen townships, which were occupied or acquired by *Connecticut* claimants who were *actually settlers* there at or before the decree of *Trenton*." It is necessary therefore to

(a) 3 *Sm. L.* 362.

ascertain precisely what is meant by the term "actually settlers," which may be done by reference to several acts of assembly, in which similar terms are used and defined. The act of 16th September, 1785,(a) contemplates as an actual settler one who resides on the land and cultivates it. In the act of 30th September, 1786,(b) a settlement is defined to be an actual, personal, resident settlement, with a manifest intention of making it a place of abode, and the means of supporting a family. The act of 3d April, 1792,(c) contemplates settlements of the same character. The act of 22d September, 1794,(d) speaks of personal residence and the raising of grain. The act of 3d April, 1804,(e) keeps in view the same description of settlers. So the acts of 27th January, 1806,(f) and of 1st March, 1811.(g) It was only in relation to settlers of this description, who had been personally resident on the land and cultivated it, that the commissioners had power to decide; and the evidence offered by the defendants below tended to shew, that the persons under whom the plaintiff claimed did not come within the meaning of the law. The proceedings of the commissioners exhibit the evidence which was produced before them, and these shew, that there was no proof of the persons from whom the plaintiff derives title, having ever been settlers on this land prior to the decree of *Trenton*. He, therefore, could have no right to a patent. The whole of the investigation on *Marcey's* application seems to have been *ex parte*; it does not appear, that *Dailey* was before the commissioners or had notice of their proceedings. To make their certificate, therefore, conclusive on one who never had an opportunity of being heard, is manifestly unjust and unlawful. The law evidently did not intend, that the decision of the commissioners should be final; for it requires them to keep a regular account of their proceedings in a book to be deposited with the secretary of the land office, for which there would have been no occasion, if it was intended they should not be examined. This Court has decided, that the certificate is not conclusive on a *Pennsylvania* claimant, nor is there any reason why it should be on a *Connecticut* claimant. It might be obtained by perjury or forgery, and if such

1818.

*Sunbury.*


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 DAILEY  
v.  
AVERY.

(a) 2 Sm. L. 342.

(b) 2 Sm. L. 395.

(c) 3 Sm. L. 71.

(d) 3 Sm. L. 193.

(e) 4 Sm. L. 199.

(f) 4 Sm. L. 268.

(g) 5 Sm. L. 199.

1818. things cannot be shewn before a Court and jury, the door is closed against the admission of truth and justice. The defendants in the present instance had acquired an equitable title; had made valuable improvements, and had no notice of the plaintiff's claim. They ought, therefore, upon every principle of equity have been permitted to shew these facts. Besides the certificate is not conformable to the act of 4th April, 1799, which speaks of *Connecticut* claimants who were *actually* settlers on the lots, and not *actual* settlers, as the certificate expresses it. If, however, the defendant's title is not valid under *Connecticut*, their father may be considered as a settler under *Pennsylvania*, and the evidence was admissible to shew a settlement under *Pennsylvania*.

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 DAYLEY  
 v.  
 AVERY.

*Huston*, for the defendant in error. The question now under discussion involves the peace and quiet of a great number of persons, whose titles ought not to be disturbed, unless the law imperatively requires it. All our acts of assembly relating to this subject, refer to *Connecticut* titles according to the rules and regulations of the *Susquehannah* Company, and of course the words "actually settlers," must be interpreted not agreeably to the meaning affixed to them in our acts of assembly, but agreeably to that which belongs to them in the system established by that company. These rules and regulations were different in different townships. Some townships were considered settled, when not more than fifty, thirty, or even twenty persons were in them; while in others, every lot was required to be actually settled. In some instances, a man had his lot composed of three different tracts. He might reside on one, cut his wood in a second, and his hay in a third, and the whole was considered as constituting one actual settlement. This was explained to the legislature at the time of passing these laws. The act of 4th April, 1799, sect. 1. provides, that the lines of the tracts submitted, shall be the same as those bounding the original tracts; which shews, that the rules of the company with regard to settlements were to govern. And indeed the condition of settlement required by the former laws was altogether dispensed with by the act of 9th April, 1807.

The 11th section of the act of 1799, invests the commissioners with judicial powers, but gives to either party, in case of dispute between *Connecticut* claimants, an election

to have the controversy decided by the commissioners or to appeal, before their decision, to the Court of Common Pleas. 1818. Their judicial powers did not extend to *Pennsylvania* claimants; it was confined to those who had *submitted* to their jurisdiction; and the word *submitted* is restricted throughout the act to claimants under *Connecticut*. *Dailey* did submit his pretensions to the commissioners; and although before their decision he might have carried the matter to the Court of Common Pleas, he could not remove it afterwards. He does not attempt to shew title in himself, but merely offers parol evidence to invalidate the certificate of the commissioners by shewing, that *Marcey*, and those under whom he claimed, did not come within the description of actual settlers before the decree of *Trenton*. Between *Connecticut* claimants the certificate ought to be conclusive, or disputes will be endless; and what proves that the law contemplated no further controversy is, that the party who obtained the patent was required to surrender all his evidences of title, and rely on the certificate and patent alone. The certificate of the *Virginia* commissioners has been decided to be conclusive between *Virginia* claimants; and in *New York* the law appointing commissioners to settle disputes in the county of *Onondago* has been held to be constitutional, and their award conclusive, unless a dissent from it be entered within two years from its date. *Jackson v. Griswold*.(a) *Jackson v. M'Kee*.(b) *Jackson v. Swartwout*.(c) *Jackson v. Ransom*.(d) These cases shew, that the Court carried the law into strict effect, by supporting the proceedings of the commissioners, and they are much stronger than the present case, because the commissioners acted without submission.

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*Sunbury.*

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v.

AVERY.

The opinion of the Court was delivered by  
TILGHMAN C. J. Both plaintiff and defendant claimed as *Connecticut* settlers; and the question is, whether, *between them*, the certificate of the commissioners is conclusive evidence of title. In construing the acts of assembly under which the commissioners acted, the Court will take notice of certain matters of public notoriety, which led to the making of these acts. In the latter end of the year 1768, or be-

(a) 5 *Johns. Rep.* 139.(b) 8 *Johns. Rep.* 489.(c) 8 *Johns. Rep.* 490.(d) 40 *Johns. Rep.* 407.

1818.  
*Sumbury.*

*DAILY*  
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ginning of 1769, a number of persons from *Connecticut* entered into the state of *Pennsylvania*, claiming, by virtue of a deed from the Indians, certain lands, which, as they alleged, were within the boundaries of the state of *Connecticut*. The government of *Pennsylvania* endeavoured to expel them, and was resisted with force; riots and bloodshed ensued, and the ground was contested, until, at the request of the continental congress, both parties agreed to remain at peace, until the war with *England* should be terminated. During that war, the *Connecticut* settlers fought bravely, and suffered great loss, from the common enemy. At length *Pennsylvania* and *Connecticut* submitted their rights to the decision of a court of commissioners appointed by Congress, according to the articles of confederation, and in the month of *December*, 1782, that Court, sitting at *Trenton* in *New Jersey*, made a decree in favour of *Pennsylvania*. From that time, to the year 1799, the legislature of *Pennsylvania*, fluctuating between a sense of justice, which impelled them to return the possession of the disputed lands to their own citizens, and a sentiment of generosity and compassion, which induced them to shew some favour to men who had, perhaps ignorantly, intruded into a couuntry, where they had spent their labour and shed their blood in the common cause, acted a wavering unsteady part. At one time, they were too severe; at another, perhaps too lenient. Meanwhile, the *Connecticut* settlers kept the possession. But conscious of the weakness of their title, they were afraid to make valuable improvements. In this situation, the county was of little value to either party, and both were weary of a contest, to which they could perceive no end. This state of mind was favourable to an accommodation, and the legislature wisely took advantage of it. The act of 4th *April*, 1799, was passed; the plan of which was, to offer a reasonable compensation in money, to such *Pennsylvania* claimants as were willing to release their rights; in order that the Commonwealth having thus regained the title, might confirm the estates of the *Connecticut* settlers at a moderate price. For this purpose commissioners were to be appointed, whose duty it would be to value the lands; and as it would sometimes happen, that there would be disputes between the *Connecticut* settlers, the commissioners were to decide between them, according to their own customs, in a summary way; provided, that if either party chose, rather to

have his cause decided in the Court of Common Pleas, he might elect to have it so done. It is evident, that the object of this law was, to restore peace to the country as speedily as possible; and it should be construed liberally, with that view. The *Connecticut* titles were *sui generis*, to be traced in the books of the Susquehannah Company; not calculated to stand the tests of a strict common law investigation, and therefore very proper to be decided by commissioners. It was doing them a favour, to afford them that mode of decision, and no appeal being provided for by the law, it must be concluded, that the judgment of the commissioners was intended to be final. But, it is contended, that in the case before us, the commissioners had no jurisdiction, because the land was not occupied by a *Connecticut* settler, prior to the decree of *Trenton*. The words of the law, (act 4th April, 1799, sect. 5.) are these:—"It shall be the duty of the said commissioners also, to ascertain all the rights or lots within the said seventeen townships, which were occupied or acquired, by *Connecticut* claimants who were *actually settlers there*, at or before the time of the decree at *Trenton*, and which rights or lots were particularly assigned to the said settlers, prior to the said decree, *agreeably to the regulations then in force among them*." Now, in the case before us, the commissioners decided, that the land was occupied and acquired by a *Connecticut* claimant, *an actual settler there* before the decree of *Trenton*, and was particularly assigned to such actual settler prior to the said decree, agreeably to the regulations then in force among such settlers. This decision is in the very words of the act of assembly, except, that the act has the words, who were *actually settlers there*, and the expressions of the commissioners *an actual settler there*. This variation is of no importance, because a man cannot be an *actual settler*, without being *actually a settler*. According to the decision of the commissioners then they had jurisdiction; and the defendants who claim under *David Dailey* are estopped from controverting it; because when he entered his claim as a *Connecticut* settler, he asserted, by implication, that the land was occupied or acquired by a *Connecticut* claimant, who was an actual settler at or before the time of the decree of *Trenton*. Let it be observed, that I give no opinion, (for the case does not require it,) whether it was necessary, that there should have been an actual settler

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on this very tract of land, at or before the decree of *Trenton*, or whether it would not have been sufficient, if the land had been owned by one who was an actual settler within the seventeen townships. I say the case does not require this point to be now decided, because, be the construction what it may, the commissioners have made their decision in the words of the law, and the defendants are estopped from denying their jurisdiction. Taking the jurisdiction then for granted, I have already given some reasons for thinking, that the decision should be *conclusive*. Their power to decide is to be found in the 11th section of the act of 4th *April*, 1799. It is there enacted, "that in case of dispute between the *Connecticut* claimants, they may elect to have the same decided by the said commissioners, or appeal, before such decision, to the Court of Common Pleas of the proper county, and a certificate from the clerk of such commissioners, or from the prothonotary of such Court of Common Pleas, before which tribunal such decision may be had, certifying in whose favour the same is adjudged, shall be good evidence to obtain a patent from the proper office aforesaid." No mention is made of an appeal from the commissioners in any part of the law, nor of any tribunal in which the cause can be re-heard or brought again into question. The act of 4th *April*, 1799, and its supplements, form one system of legislation on the same subject. In the supplement of 6th *April*, 1802, there is a provision which operates powerfully in favour of the conclusive nature of a decision of the commissioners. By the 10th section of that supplement, it is made the duty of the commissioners to demand and "receive of and from each *Connecticut* settler and claimant applying for a certificate under the act of 4th *April*, 1799, or the said supplement, any deed and document of title under the *Susquehanna Company* relating to the lands required to be certified, which may be in the power or possession of such *Connecticut* claimant or settler, previous to the issuing of any certificate for such lands, which deeds and documents shall be transmitted by the said commissioners to the secretary of the land office, together with all other papers relating to the said commission, when required by the Governor." It cannot be supposed, that it was intended to disarm a man of his title papers, before the suit was finally decided. In case of a dispute between a *Connecticut* and a *Pennsylvania* claimant, the commissioners

were not authorised to decide ; but in such case, the possession of the papers proving the *Connecticut* title, would be of little use. A case a good deal analogous to the present, existed in that part of the state which borders on *Virginia*. When *Pennsylvania* and *Virginia* entered into a compact for the settlement of their boundaries, it was agreed, that the first grant made by either state, within the disputed territory, should be confirmed. *Virginia* appointed commissioners to settle disputes between her own people ; and it has been repeatedly decided by our Courts, that in disputes between *Virginians*, the certificate of the *Virginia* commissioners was conclusive ; but between a *Virginian* and a *Pennsylvanian*, it was only *prima facie* evidence. The same principle may be applied to the seventeen townships in *Luzerne* county. For the decisions of the Judges of the Supreme Court on the *Virginia* cases, I refer to *Smith's lessee v. Browne*, and *Hyde's lessee v. Torrence*, 2 Sm. L. 131, 132, notes.

But it has been urged on the part of the defendants, that the evidence offered by them was proper, to shew that *David Dailey* acquired title as a settler under *Pennsylvania*. But here again the defendants are estopped. They shall not deny the declaration of their father, that he claimed as a *Connecticut* settler, and so claiming, he could acquire no title under *Pennsylvania*. It would be monstrous, if one could acquire title under the state, at the very moment in which he was violating her laws, and by the very act which was in direct violation of them. Neither plaintiff nor defendants have a vestige of legal title before the act of 4th April, 1799, because, before that period their possession was considered as *tortious*. Neither has any title, but from the bounty of the Commonwealth, and the legislature had a right to dispense that bounty on their own terms. This is an additional reason, why neither has just cause of complaint, if, for the sake of restoring quiet to the country it was thought proper to oblige them to have their disputes settled speedily, and without appeal. On full consideration, I am of opinion, that between *Connecticut* claimants the decision of the commissioners is conclusive.

There is another bill of exceptions on the record. The application of *Zebulon Marcey* was for 300 acres, but the commissioners gave him 367 acres. The defendant's counsel prayed the Court to instruct the jury, that the plaintiff

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could not recover more than 300 acres; but the Court was of opinion, that he might recover the whole 367 acres. The Court was right. The act of 6th *April*, 1802, sect. 9, directs the commissioners to survey and certify *the whole* of each tract claimed by a *Connecticut* claimant, who shall establish his title thereto. So that if upon actual survey, the tract was found to contain more or less than the claimant supposed, that was immaterial; the commissioners were to ascertain the quantity, and give the claimant the *whole tract* to which he had shewn title. I am, therefore, of opinion, that the decisions of the Court of Common Pleas, were in all respects right, and their judgment should be affirmed.

Judgment affirmed.

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### WHITMIRE *against* NAPIER.

*Thursday,*  
June 18.

IN ERROR.

Recitals of the title in a patent from the warrantee down to the patentee, are evidence against a defendant who relies on possession alone, and shews no title.

The probate of one of the witnesses to a deed, certified by a Judge, but not under his seal, is sufficient.

IN this case two points were determined, which THE COURT considered as settled.

1. In ejectment, the plaintiff having produced a patent with recitals of the title from the warrantee down to the patentee, and the defendant standing on his possession, but shewing no title, the recitals in the patent are evidence against him.

2. A Judge took the probate of one of the witnesses to a deed, and certified the same, but not under his seal; the deed was held to be well proved.

*Bellas*, for the plaintiff in error.

*Bradford and Hall*, contra.

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**LEVY against The Commissioners of Northumberland  
county.**

IN ERROR.

Thursday,  
June 18.

THIS action was brought by *Daniel Levy*, esq. late prothonotary of *Northumberland* county, against the commissioners of that county, for fees on account of official services performed for the use of the county. It had been the practice before the passing of the fee bill of 28th *March*, 1814, for the officers to charge fees for certain services for which the existing fee bill had made no allowance. These were known by the name of *compensatory* fees. On the trial of this cause, the Court gave their opinion, that since the passing of that law no such compensatory fees could be allowed, even for services performed *before* the passing of the act, and to this opinion the counsel for the plaintiff excepted.

The 26th section of the fee bill of 28th *March*, 1814, does not take away the right to compensatory fees for services performed *before* the passage of that act, where such fees were by law allowable.

Fees for every service performed by an officer, whether mentioned in the table of fees which existed prior to the act of 1814, or not, cannot be allowed, but it seems that some compensatory fees, sanctioned by ancient usage, may legally be charged.

*Huston* and *Watts*, for the plaintiff in error.

*Hepburn* and *Hall*, for the defendants in error.

The opinion of the Court was delivered by

TILGHMAN C. J. The question depends on the 26th section of the act of the 28th *March*, 1814. It is not intended to express any opinion as to the allowance of the compensatory fees charged by the plaintiff for services performed before the act; but assuming, that in certain cases such fees might be allowable before the act, we are to decide, whether they are taken away by that act. To take away, by retrospect, what a man had earned under the existing law, seems so contrary to justice, that a law shall never be so construed, unless the intention is clearly expressed. Now so far is the act of 1814, from clearly expressing such an intent, that in my opinion, the intent is plainly to the contrary. The words are these, (sect. 26.) "If any officer whatsoever shall take greater or other fees than is herein-before expressed and limited, *for any service to be done by him after the 1st day of September next*, in his office, or if any officer shall charge or demand and take, any of the fees herein before-mentioned, where the

1818. *Sunbury.* business for which such fees are chargeable, shall not have been actually done and performed, or if any officer shall charge or demand any fee, for any service or services other than those expressly provided for by this act, such officer shall forfeit and pay to the party injured \$50, to be recovered as debts of the same amount are recoverable; and if the Judges of any Court of this Commonwealth shall allow any officer, under any pretence whatever, any fees under the denomination of compensatory fees, for any services not specified in this act, or some other act of assembly, it shall be considered as a misdemeanour in his office."

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land county.

The object of this section is, to make an end of all compensatory fees for services performed after the 1st *September*, 1814; and for all such services, to confine the officers strictly to the table of fees established by that act. When it is said, that the officers shall not take greater or other fees than are in the said act expressed, for services to be done, *after the 1st September*, 1814, it is plainly implied, that for services done *before that day* they may take such fees as were allowed by law at the time of the passing of the act. And in order to give sense and consistency to the whole section, these words, "*for services to be done after the 1st September, 1814,*" are to be understood throughout. Any other construction would make monstrous absurdity. With regard to that part which relates to the Judges, for instance, it cannot be supposed, that they are not to allow those fees which the officer may lawfully charge. But to say, that the officer is to be governed by the new fee bill, only as far as respects services done *after the 1st September*, 1814, and yet that a Judge, in taxing the officer's costs, must look only to that fee bill, (so far as respects compensatory fees,) for services performed *before the 1st September*, 1814, would be in effect, to permit the officer to *charge* his fees by one law, and yet deprive him of those fees, by compelling the Judge to *tax* them by another law. This is too great injustice, and too great absurdity to impute to the legislature, even if the words were doubtful. But they are plain enough. The charging of the fees by the officer, and the allowance by the Judge, must be referred to the same object, *viz. fees for services performed, after the 1st September*, 1814. The words, *or some other act of assembly*, towards the end of the section, are to be understood of other acts which should be thereafter made. With regard

to compensatory fees in general, the subject was considered 1818.  
 by this Court, in the case of *Irwin v. The Commissioners of Sunbury*.  
*Northumberland county*. And it was our unanimous opinion, LEVY  
 that the principle of charging fees *for every service performed* v.  
*by an officer*, whether mentioned in the legal table of fees The Commis-  
 or not, could not be supported. Some compensatory fees sioners of  
 were sanctioned by ancient usage, but there were many ser- Northumber-  
 vices for which the officers had been allowed nothing, and of land county.  
 this they ought not to complain, because they always had the  
 option of avoiding the trouble by resignation of the office. I  
 have thought proper to refer to this decision, in order that it  
 may be laid before the Court of Common Pleas, when this  
 case shall be tried again. I am of opinion, that the judgment  
 should be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias*  
*de novo* awarded.

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### FUGATE against COXE.

IN ERROR.

June.

ERROR to the Court of Common Pleas of Centre  
 county.

*Coxe*, the plaintiff below, claimed the land for which this  
 ejectment was brought, under a warrant to *William King*,  
 on which a survey was made on the 18th November, 1785.  
 It was proved, that a survey was actually made with lines  
 and corners marked, excluding the land in dispute, which  
 was complete, except the closing line which was left open.  
 The plaintiff asserted, that this survey had been relinquished  
 and another made in its stead, including the land in contro-  
 versy, according to the return which was given in evidence. The  
 defendant denied, that any survey, according to the return,  
 had ever been made. There was strong evidence, that at  
 least one of the lines had been run and marked on the  
 ground; and the Court gave it in charge to the jury, that the

Great re-  
 gard is to be  
 paid to the re-  
 turn of a de-  
 puty surveyor,  
 and even  
 slight evi-  
 dence of lines,  
 or corners  
 marked, will  
 justify a jury  
 in presuming,  
 that the sur-  
 vey was made  
 as returned;  
 but the run-  
 ning of one  
 line only is not  
 sufficient to  
 establish a re-  
 turn of survey.

1818. running of one line would be sufficient to establish the return.  
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The jury, accordingly, found for the plaintiff, and the cause being removed to this Court, the question arising out of the Judge's charge was argued on the 27th *June*, 1816, by *Hale* and *Huston*, for the plaintiff in error, and by *Burnside*, *Watts* and *Duncan*, for the defendant in error. And now, after stating the facts,

The opinion of the Court was delivered by

*TILGHMAN C. J.* Had the charge been, that great regard should be paid to the return of the surveyor, and that even slight proof of lines or corners marked, would justify the jury in presuming, that the survey was made as returned, I should have heartily agreed with it. But I think it was going too far to say, that although only one line was run and marked, it was sufficient. Were the question only between the Commonwealth, and a person who had paid for the land, especially if a patent had issued, there would be great reason for holding the return to be sufficient evidence of a survey. But this case is different where a third person is concerned. In the present instance, for example, the defendant relying on the lines which were marked, might have innocently taken up the land in contest, as vacant. I say it might have been so; whether it was so, I know not, for that was a fact disputed. It has been usual for surveyors not to make an actual running of the closing line; they leave that open, in order to enable them to correct the survey, if necessary, when they have calculated the quantity of land included in the lines; they then close the survey on paper, and sometimes shorten or lengthen one of the lines, in order to make the quantity correspond with the warrant. This practice is very convenient, and has been sanctioned by long usage. But to return a survey, altogether different from that which was run and marked, is what I suppose never to have been practised, and what cannot be justified. There is no doubt but a survey regularly made, and not returned, may be relinquished, and another made and returned instead of it. And if that was done by the plaintiff, it was all very well. Neither should I object to a charge which pressed upon the jury, the propriety of presuming, that a sworn officer had told the

truth, if even a few marks on the ground were in correspondence with the survey returned. But in the case now under consideration, it was laid down, I think too peremptorily, that it was a good survey, although only one line was run and marked. The law, with respect to the running and marking of surveys will be found correctly explained, in the cases of *Nicholas's lessee v. Holliday*, 2 Sm. L. 256. *Drinker's lessee v. Holliday*, 2 Sm. L. 255, and *Toder's lessee v. Flemming*, 2 Sm. L. 256. I am of opinion, that it should have been left to the jury to decide, whether a survey, according to the return, had or had not been made. That not having been done, the judgment should be reversed, and a *venire facias de novo* awarded.

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Sunbury.

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v.  
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Judgment reversed, and a *venire facias de novo* awarded.

It is proper to mention, that the opinion of the late Judge YEATES, who heard the argument in this case, corresponded with that which I have just delivered.

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### BURNS against BURNS.

IN ERROR.

June.

AN issue of *devisavit vel non* having been directed by the register's court of *Mifflin* county to determine the validity of a paper, purporting to be the last will of *James Burns*, it was tried in the Common Pleas of that county, on the 19th *May*, 1817, when, after much contradictory evidence had been given, which was left to the jury to decide, the Court laid down certain principles of law, one of which was considered by the counsel of the plaintiff in error, to be erroneous. The circumstances of the case, and the exceptionable part of the charge, sufficiently appear in the opinion of the Court.

If a man having two wills in his hand, intending to destroy the last, by mistake destroys the first, the law does not require, in order to revive and establish the one to be destroyed, such proof as is necessary

to give validity to an original will, *viz.* proof by two witnesses. Evidence of the intention of the testator, as to which will he intended to destroy, may be rebutted by contrary evidence, though but by one witness.

The act of assembly being silent as to revocations *in law*, questions arising on such revocations, must be proved as other matters of fact, without regard to the form prescribed by the act of assembly for the probate of wills.



1818. *Carothers and Hall*, for the plaintiff in error.

*Sunbury.*

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*BURNS.*

*Huston and Watts*, for the defendant in error.

The opinion of the Court was delivered by

TILGHMAN C. J. This cause was tried in the Common Pleas, on an issue directed by the Register's Court to decide the validity of a writing exhibited as the last will and testament of *James Burns* deceased. The error assigned, is in the charge of the Court. It appears from the evidence, that *James Burns* had made two wills; the first, written by *William Starrett*, and the last, (the one in question,) by *Thomas Meminger*. The will written by *Meminger* was produced on the trial, and well proved, according to the law of *Pennsylvania*. The objection to it was, that the testator, about two months before his death, having both wills in his hands, threw the one drawn by *Starrett* into the fire, intending to leave that which was drawn by *Meminger*; that he supposed he actually had burnt the one drawn by *Meminger*, and continued under that deception to the time of his death, his wife having taken that will from him, immediately after he had burnt the other, and preserved it without his knowledge until he died. On this subject, the evidence was contradictory, so as to leave it doubtful, whether the testator really knew, or not, which will he had burnt. The presiding Judge summed up the evidence, and made many pertinent remarks to the jury; he told them, however, that he would "*lay down some principles to guide them;*" and although in the conclusion of his charge he submitted it as a matter of fact, whether *Robert Burns* intended at the time of his death, that the writing drawn by *Meminger* should be his last will, yet we must suppose that the jury, in forming their decision, paid regard to the principles of law laid down by the Court. One of these principles was expressed as follows:—"A will intended to be cancelled, may be resuscitated in the same manner, and by the same proof as the making a will. There must be full proof to give it new life." From these expressions, the jury must have understood, that if *Burns* intended to destroy the will drawn by *Meminger*, that will could not be established without such new proof as would be necessary to the validity of an original will; that is to say, proof by two witnesses. It is a strong circumstance in this case, that the will drawn by *Mem-*

inger, was fully proved. What then was to destroy its efficacy? It is invalidated, say the defendants, by *the intent to burn it*. If he had actually burnt it, there would have been an end of it. But the will remaining in existence, it is a matter of fact in the first place, whether he intended to burn it or not, and it is also a matter of fact, whether, supposing he did intend to burn it, he did not afterwards know, that it was in existence, and intend that it should stand for his will. These facts are to be proved as facts in general, and not according to the mode prescribed by the act of assembly, for the probate of a will. The act requires two witnesses; but I apprehend, the evidence given by the defendant of the intention of *Burns*, at the time he threw one of the wills into the fire, may be rebutted by contrary evidence, though but by one witness. Suppose, for instance, it had been proved by one witness, that *Burns* had said, he had intended to burn the will drawn by *Meminger*, but discovered afterwards, that he had not burnt it, and was glad of it, as he thought, upon further reflection, that it contained the best disposition he could make of his estate, and should preserve it as his last will; why should not this evidence be sufficient to establish a will, which was well proved by other witnesses? It is not, properly speaking, evidence to *prove* the will, but to take off the effect of other evidence, which had shewn a design to destroy it. The act of assembly is silent as to revocations *in law*, such as burning, cancelling, &c. therefore, when questions arise on such revocations, they must be proved as other matters of fact, without regard to the form prescribed by the act of assembly, for the probate of a will. It appears to me, therefore, that the cause was submitted to the jury, under a direction in matter of law, by which they might easily be misled, and it is impossible to say, what their verdict would have been, had the law been laid down correctly. This is the only part of the charge which is exceptionable, but as it went to a very important point, I am of opinion, that the judgment should be reversed, and a *venire facias de novo* awarded.

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*Sunbury.*


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 BURNS  
 v.  
 BURNS.

Judgment reversed, and a *venire facias de novo* awarded.

1818.

Sambury.VINCENT *against* The Lessee of HUFF.

IN ERROR.

June.

The acts of a deputy surveyor done in the course of his official duty are evidence to shew for whom he made a survey; but acts which are not official are not admissible.

A deposition taken under a rule of Court, without notice to the opposite party, cannot be read in evidence; though a person having an interest in the subject of the dispute, attend, without authority, and cross-examine the witness.

The docket entries of the prothonotary are not evidence of the issuing, service, and return of a writ. They are merely minutes of the officer; and the writ itself, with the return indorsed on it, should be produced.

When a deposition is to be taken before a justice of the peace on interrogatories, it is his duty to put the interrogatories separately to the witness, and obtain a distinct answer to each; and if the witness refuse to answer, he should certify that fact at the foot of the deposition. If these things be not done, the deposition cannot be read in evidence.

If one party prove by evidence a witness to be interested, the witness cannot purge himself of the interest by his own oath.

A release by a tenant in possession of all his interest in the land, will not make him a competent witness for his landlord; because he is interested in supporting the title under which he holds possession. Upon the same principle, evidence that the title is vested in another person, will not make him competent; because, if the plaintiff should recover, he is liable to be turned out of possession.

In Pennsylvania, that is to be considered as already done, which chancery would enforce the performance of. Where, therefore, a plaintiff cannot enforce a specific execution of his contract against the defendant or those under whom he claims, he cannot recover in ejectment. He cannot recover without having paid or tendered the purchase money before bringing suit.

If the Court, on being requested, refuse to instruct the jury on a point of law, it is error.

THIS was a writ of error to the Court of Common Pleas of *Lycoming* county, in an action of ejectment brought by the lessee of *Edmund Huff*, the defendant in error, against *Peter Vincent*, in *February*, 1799. A number of exceptions were taken, as well to the admission of testimony as to the charge of the Court; all of which are fully stated and explained in the opinion of the Court.

*Greenough and Hall*, for the plaintiff in error.

*Bellas and Watts*, for the defendant in error.

The opinion of the Court was delivered by

GIBSON J. Both parties claim under an application of the 3d *April*, 1769, in the name of *John Palmer*. On the 17th *October*, 1761, a survey was made by *Charles Lukens*, the deputy surveyor, in the name of *John Palmer*. The plaintiff alleges the beneficial interest was in *Jesse Lukens*; and that he derives title from him. The defendant claims under *John Lukens*, the father of *Jesse*, then and until the time of his death the surveyor general of the land office, and who, the defendant says, was the owner of the location and survey. The survey, with certain indorsements on it in the handwriting of *Charles Lukens*, was given in evidence by the plaintiff without objection; but an indorsement, dated the

27th October, 1783, was objected to, but admitted. It was 1818.  
 in these words:—"Sent a copy to *John Lukens*, esq. the *Sunbury*.  
 land being the property of the representatives of *Jesse* VINCENT  
*Lukens*. I have been informed, that *Jesse* had sold it to one The Lessee of  
*Jones*, who did not comply with the terms of the contract, Hurr.  
 which was merely verbal." Signed, *Charles Lukens*. It is  
 to be observed, the survey was not returned into office till  
 after the death of *John Lukens*, for it appears by an indorse-  
 ment, it was brought to the office on the 27th July, 1790, by  
 Major *Lenox*, one of his executors. It is clear, that any act  
 of a deputy surveyor done in a course of official duty, is evi-  
 dence to shew for whom he made a survey; but if the act be  
 unofficial, it is inadmissible. Hence a certificate of one who  
 had been a deputy surveyor, that at a previous time a party  
 had paid him fees for making a survey, was held incompetent  
 to prove, that the survey was made for him. *Lessee of Clug-*  
*gage v. Swan*, 4 Binn. 150. For the same reason the decla-  
 rations of a deputy surveyor, though dead at the time of the  
 trial, that he made a certain survey, under an order from the  
 proprietaries, are not evidence. *Lessee of Bonnet v. Deve-*  
*baugh*, 3 Binn. 175. In the present instance the indorsement  
 was not an official act, but a private memorandum of a family  
 transaction at a time when *Charles Lukens* had ceased to be  
 the deputy surveyor of the district, and although he might  
 return surveys theretofore made by him, he had no other au-  
 thority. He could not by his declarations or any other act  
 affect the interest of any person. That *John Lukens* con-  
 sidered the matter as a family transaction, is evident from his  
 keeping the paper in his possession till his death. This copy  
 of the survey was not transmitted to him in his official capa-  
 city, or it would have been filed in the surveyor general's  
 office. The evidence, therefore, should have been rejected.

The plaintiff offered a receipt for 50*l.* part of the purchase  
 money of the land in question, signed by *Charles Lukens* admi-  
 nistrator of *Jesse Lukens*; the defendant objected, that no evi-  
 dence of title in *Jesse* had been given, to lay a foundation for  
 this evidence. This was not true in point of fact; for on the  
 draught of survey returned, there was this indorsement,  
 "*John Palmer now Jesse Lukens*." This was at least some  
 evidence of a beneficial interest in the latter.

The deposition of *John Baker*, taken under a rule of  
 Court, but without notice, was admitted. There was some

1818. evidence, that one *Robert Quay*, on whom notice had been served, and who is said to have an interest in the land in dispute, attended at the taking of the deposition and cross-examined the witness. But there is no evidence, that he had any authority from the defendants, and his interference being an act merely voluntary on his part, they are not bound by it. Notice to special bail, is not sufficient to entitle a deposition to be read against the principal. But the point is too clear for argument; the evidence should have been rejected.

*Sundbury.*

*VINCENY*

*v.*

*The Lessee of*  
*HUNT.*

The defendant having given in evidence the record of a former recovery between the parties, offered the docket entries of the prothonotary as evidence of the issuing, service, and return of a writ of *habere facias possessionem*, which was over-ruled by the Court. In this there was no error. Those entries were but the minutes of the officer, and inferior to the writ itself, with the return indorsed on it, which should have been produced.

A deposition of *Adam Walker*, offered by the plaintiff, was objected to, but was admitted. It was originally taken before an associate judge of *Lycamington* county, but the defendant wishing to have the benefit of a cross-examination, it was agreed by the parties, that a supplementary examination should take place before a justice on interrogatories filed. This was accordingly done, but it appears, that one of the interrogatories put by the defendant, which was material to the issue, was not answered. I consider the evidence taken on these two examinations as constituting one whole. This deposition, therefore, taken on interrogatories, is analogous to evidence returned on a commission. It was the business of the justice to put the interrogatories severally to the witness, and obtain distinct answers to each; and if the witness refused to answer, he should have certified that matter at the foot of the deposition. Each party was respectively entitled to all the information the witness could give; and this deposition, evidently imperfect in that respect, should not have gone to the jury.

*Robert Quay* was produced as a witness by the defendants, and rejected on the ground of interest. There was evidence, that after a former recovery by the defendants, he received the possession from the sheriff as their agent, that he remained in possession ever since, and that he sometimes claimed the land as his own. On the other hand the defendants offered

*Quay* to prove on his *voir dire*, that he had no interest; and they read a release from the witness, acknowledged at the bar, to *Joseph T. Quay*, transferring his interest if any to the latter; and in addition, they offered a deed from *David Lenox*, surviving patentee, in trust for the heirs and devisees of *John Lukens* to *Daniel Smith*, and a deed from *Smith* to *Joseph Fearon*, who is said to be the real defendant in the cause. It is most certain, that the witness could not be examined to prove his own competency. The plaintiff might have examined him on his *voir dire* to prove him interested, and if he had taken that course, he could have resorted to no other. But having adduced evidence of interest, *aliunde*, it was not competent to the defendant to rebut it by the testimony of *Quay* himself. The release of the witness could only divest an interest in the land, but it could not divest his interest in supporting the possession of the defendants, under whom he came in; for on a recovery in this action he and his tenants would be turned out. In *Bourne v. Turner*, 1 Str. 632, the Court refused to permit the landlord to be substituted in the stead of his tenant in possession, for the purpose of making the latter a witness, he being liable in an action for the *mesne* profits; and it has been held that a tenant, though not a party on the record, is not a witness to prove possession in his landlord, where that fact was necessary to a defence in ejectment, for such evidence was to support his own possession. The deed from *Lenox* to *Smith*, and from him to *Fearon*, could have no greater operation than the release of the witness, and did not answer the objection arising from the liability of the witness to be turned out in the event of a recovery. He was therefore rightly excluded.

One exception yet remains; it is to the charge of the Court. The plaintiff claimed under an equitable title from *Jesse Lukens*. He had been in possession; had made improvements, and there was some evidence he had paid the purchase money. The defendant requested the Court to instruct the jury, that the plaintiff could not recover, without having paid or tendered the purchase money before he brought the present suit. This was a material part of the case. In *Pennsylvania*, having no court of equity, we are compelled to consider that as already done, which chancery would enforce the performance of, and this is the reason why an action of ejectment may be supported in this state on an equitable title.

1818.

*Sunbury.*

VINCENT

v.  
The Lessee of  
Hurr.

1818. *Sunbury.* If, therefore, the plaintiff could not enforce a specific execution of his contract against the heirs or representatives of *Jesse Lukens*, (and that he could not without payment or tender of the purchase money is beyond all doubt,) he could not recover against the defendants. To the request of the defendants, the Court answered there was in fact evidence, that the money had been paid; but this was a matter for the consideration, not of the Court, but the jury, who might have held a different opinion. The defendants had a right to the direction of the Court as to the law, in case they should be of opinion, that only a part was paid; and although it was laid down in general terms, that if the purchase money was paid, the plaintiff might recover, yet the law arising from the converse of the proposition was not stated. The Court were requested to state it; this was refused; and it is error.

VINCERT  
v.  
The Lessee of  
Huff.

Judgment reversed, and a *venire facias de novo* awarded.

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### McCoy against The Trustees of Dickinson College.

IN ERROR.

June.

A title by warrant and survey, without patent, is within the act of limitations of 26th March, 1785, and is barred by an adverse possession of twenty-one years.

ERROR to the Court of Common Pleas of *Northumberland* county.

The Trustees of Dickinson College, the plaintiffs in this ejectment, claimed under an application entered in the land office the 3d *April*, 1769, and a survey executed the 9th *July*, 1772, and returned the 28th *August*, 1772. The land had not been patented. When the plaintiffs had finished their evidence, the defendant offered to prove a possession in himself and those under whom he claimed, adverse to the plaintiffs, from the year 1787 to the commencement of this suit. This evidence was objected to by the plaintiffs, and rejected by the Court. An exception to the opinion of the Court was taken by the defendant, and whether the evidence was legal was now the question.

*Marr and Huston*, for the plaintiff in error. There is nothing in *England* which resembles our title by warrant and survey, by location and survey, or by settlement, without patent. Nothing, therefore, can be deduced from the law of *England*, applicable to this case. Our act of assembly of 26th March, 1785, (a) which was intended to apply to such estates as exist in *Pennsylvania*, declares, that no person shall maintain any writ of right, or any other real or possessory writ, or action for any manor, lands, &c. of the seisin or possession of him, her, or themselves, his, her, or their ancestors, or predecessors, nor declare or allege any other seisin or possession of him, her, or themselves, his, her, or their ancestors, or predecessors, than within twenty-one years next before such writ, action, or suit, so hereafter to be sued, commenced, or brought. When this law was passed, the nature of these equitable estates was perfectly understood by the legislature. Whatever might have been the law prior to that period, it was then universally known, that an estate held by warrant and survey, had (saving the paramount title of the Commonwealth,) all the features of a legal estate; that it would descend; that it was subject to dower and curtesy, and might be recovered in ejectment. It would be absurd then to suppose, that the legislature intended to confine the operation of the act of limitations to the estates of those who had paid their purchase money and obtained a patent, and to protect the imperfect titles of those who had been in default. It is not contended, that the act of limitations was intended to reach the Commonwealth; but her rights may be protected without excluding unpatented lands from the provisions of the act. The act of limitations operates as a transfer of the plaintiff's title to the defendant, who has been in possession twenty-one years, and the Commonwealth has the same remedy for the recovery of the purchase money against the person in possession, as against him who was originally answerable for it, according to the price at which public lands were sold at the time he entered. No two things can be more unlike than the present case, and that of *Morris v. Thomas*. (b) There the question in substance was between the Commonwealth and a person who had made no settlement, nor had done any thing by which an inception of title was vested in him. The case goes no further than to decide, that under

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*Sunbury.*

M'Cor

v.

The Trustees  
of Dickinson  
College.

(a) 2 Sm. L. 399.

(b) 5 Binn. 47.



1818. such circumstances, the Commonwealth may sell the land to  
*Sunbury.* another person, and that the purchaser shall not be affected  
 M'Cor by the unlawful possession which had taken place before he  
 v. received the grant.  
 The Trustees  
 of Dickinson  
 College.

*Hepburn, Hall, and Watts*, for the defendants in error. Before the defendant below excepted to the Court's opinion rejecting the evidence which he offered of possession, he ought to have stated the nature and extent of the possession he intended to prove, for nothing but an actual occupancy, a definite, positive, notorious possession, will prevent a recovery in ejectment. *Jackson v. Schoonmaker.*(a) The Commonwealth stands in the place of the proprietaries, she retains the legal title, subject to an obligation to convey to the defendants in error, on their payment of the purchase money and interest, according to the terms of the original agreement; and against the Commonwealth it has been decided in all the states, acts of limitations do not run. *Tasker's lessee v. Whittington.*(b) If the defendants in error, who are the grantees of the Commonwealth, and for whom the Commonwealth is a trustee, are barred by the act of limitations, the Commonwealth is substantially barred also; because the contract between her and the defendants in error, will be destroyed, and she will lose the purchase money; or at least she cannot recover interest beyond the time when the plaintiff in error entered on the land; but if the act of limitations be not a bar, the original contract is kept, and the defendants in error can only obtain a patent on the payment of the whole of the purchase money and interest. By settlement, the plaintiff in error could acquire no title, because the land had been surveyed for the defendants in error, before his entry; and a defendant is not allowed to give evidence of improvement and settlement after the return of the plaintiff's survey. *Pigou v. Nevill.*(c) But the case of *Morris v. Thomas.*(d) in which it was decided, that the act of limitations is no bar to the Commonwealth or her grantee, seems to put the question to rest.

The opinion of the Court was delivered by

TILGHMAN C. J. By the act for the limitation of actions, passed the 26th *March*, 1785, no person shall have

(a) 2 *Johns. Rep.* 230.

(b) 1 *Har. & M'Hen.* 151.

(c) 2 *Sm. L.* 180.

(d) 5 *Binn.* 77.

or maintain any real or possessory writ or action, for any lands, tenements, or hereditaments, of the seisin or possession of himself, or his ancestors or predecessors, nor declare or allege any other seisin or possession of himself, his ancestors or predecessors, than within 21 years next before such writ or action, hereafter to be sued, commenced, or brought. The evidence offered by the defendant went directly to prove, that neither the plaintiffs nor the persons under whom they derived title had been in possession for more than 21 years before the commencement of the suit. Why then was it not legal evidence? Because, say the plaintiffs, the land not having been patented, the legal title remained in the Commonwealth, and the Commonwealth not being bound by the act of limitations, neither are those persons bound who hold the land under the Commonwealth. This is a question of very great importance, hitherto undecided; and in order to judge of it, we must consider the nature of a title by warrant, or application and survey, without patent. In *Pennsylvania*, lands to a very great amount are held by such titles, and if they are excepted from the operation of the act of limitations, no inconsiderable portion of the state will be left exposed to that uncertainty, which it was the object of the act to prevent. It was the custom of the proprietaries of *Pennsylvania*, from ancient times down to the revolution, to contract for the sale of lands, in various modes, and to deliver possession, without receipt of the purchase money. But in such case, no patent was issued; consequently they retained the legal title. The title of the purchasers was *sui generis*, unknown to the law of *England*, and at first, not well defined by our own law. Until towards the year 1760, rights of this kind were considered as personal property. About that time, (I will not undertake to fix the period,) they assumed a more important character, and were considered as real estate; and it is certain, that at least from the year 1760, a title by warrant and survey has had all the principal attributes of a legal estate, saving the right of the proprietaries and of the Commonwealth who succeeded to them. It will support an ejectment, it descends as real estate, it is to be conveyed as real estate, it is subject to the rights of dower, and tenancy by the curtesy. It has been recognised as real estate by acts of assembly; at the time of the passing of the act of limitations, it was perfectly understood

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*Sunbury.*

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*Sunbury.*  
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 v.  
 The Trustees  
 of Dickinson  
 College.

by the legislature, and must have been intended, without doubt, to be comprehended in that act, in such manner as not to impair the right of the Commonwealth. Until the patent issues, the legal title is in the Commonwealth, and the act of limitation has no force against the Commonwealth. Even without having recourse to the pre-eminent rights which exempt the supreme power of the nation from the operation of statutes in which it is not expressly named, it is evident, from the nature of the case, that the possession of those persons, who hold unpatented lands, is not adverse to the Commonwealth. On the contrary, the nature of the contract, and the custom of the country prove, that the possession is under and with the consent of the Commonwealth. But as to all private persons, the case is different, and it would be attended with incalculable mischief, if the undisturbed possession for 21 years should confer title and safety on the holders of patented lands, but be of no avail where there is no patent. The words of the act of limitations embrace both cases, nor is the least trace of distinction between them, to be found in that act. As to the right of the state, it is the duty of the Court to protect it, without extending their protection to others, who stand in different circumstances, and who cannot be protected without throwing the country into confusion. It is to no purpose to cite cases upon the British statute of limitations; they are inapplicable, because *England* has no species of property, like our right under warrant and survey. I have said, that this point has never been decided in *Pennsylvania*. The plaintiff's counsel seem to think that it has been, and cite the case of *Morris v. Thomas*, 5 Binn. 77. But an examination of that case will soon shew, how different it is from the present. The plaintiff, (*Morris*), claimed under a warrant dated the 3d April, 1750, and a survey by virtue of that warrant, made 31st December, 1805. But it is to be noted, that the warrant was *indescriptive*, so that no title to the surveyed land, attached till *the execution of the survey*. The defendants claimed under an improvement in 1783, unaccompanied with a settlement or any other circumstance, which would be the commencement of an equitable title under our laws. In fact, the defendants being possessed of an adjoining tract of land, did no more than go over their lines, and cut wood on the vacant land of the Commonwealth. Against the Commonwealth then, there was no pos-

session on which the act of limitations could operate; neither could it operate as a bar to the plaintiff, (*Morris*), because his title to the land in dispute commenced only on the 31st December, 1805, which was but three or four years before the commencement of the suit. But if *Morris's* survey had been executed in the year 1750, soon after the date of the warrant, the law would have adjudged him to be in possession, at least, from the return of survey, and when once in possession, his title would have been of that kind, upon which the statute of limitations might operate. In the case before us, the survey was returned the 28th August, 1772, and from that time the estate was subject to the act of limitations, saving the right of the Commonwealth. I am very clear, therefore, that the defendant's evidence ought to have been received. At the same time, I desire it to be distinctly understood, that I give no opinion, nor have I formed any opinion beyond the point immediately decided. The defendants' evidence ought to be received; but what will be the consequence of possession taken without title, as to the extent of the possession; or whether such possession will in law be extended beyond the actual inclosures of the occupant, is a question not now before us. The consequences of laying down general principles on the act of limitations are so important, that I hold it my duty to be extremely cautious of intimating any opinion on points out of the record. Being satisfied, that there is error appearing in this record, I am of opinion, that the judgment should be reversed, and a *venire facias de novo* awarded.

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*Sunbury.*M<sup>c</sup>Corv.  
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of Dickinson  
College.

DUNCAN J. having been of counsel with the defendants in error, did not sit in the cause.

Judgment reversed, and a *venire facias de novo* awarded.

1818.

Sanbury.BRYSON *against* KER and another administrator of  
IRVINE.Same *against* Same.

IN ERROR.

*June.*

In an action of debt on bond, it was held, that under the plea of payment with leave to give the special matter in evidence, the defendant might prove that the plaintiff had agreed that certain monies to be paid by the defendant should be deducted from the amount of the bond, and that he had paid them, without having given the notice of special matter required by the 11th rule of the Court of Common Pleas of Columbia county.

THESE were actions of debt on bonds brought in the Court of Common Pleas of *Columbia* county, by the defendants in error against the plaintiff in error, in which the defendant below pleaded payment, with leave to give the special matter in evidence. The replication in each suit was *non solvit* and issue. They were tried before arbitrators, from whose award the plaintiffs appealed, and in the Court of Common Pleas it was agreed that both causes should be tried together. After the bonds had been given in evidence, the defendant offered to prove, they were given in part payment for a tract of land which had formerly belonged to one *Lazarus*; that a short time after the defendant had purchased, an ejectment was brought by the heirs of *Lazarus* against him; that he employed counsel to defend the said ejectment, and paid considerable sums of money in conducting the defence, and that *Robert Irvine*, the plaintiffs' intestate, agreed, after the said ejectment had been brought, that whatever money the defendant should expend in fees of counsel and for other necessary purposes in defending the said ejectment, should be deducted from the amount of the bonds, and that he should also be allowed for his time and trouble.

The defendant further offered to prove, that all the evidence above-mentioned had been given before the arbitrators who tried these causes, in the presence of the plaintiffs or one of them; that their attorney took it down in writing, and that no objection was made to its admission.

The plaintiffs' counsel objected to the admission of this evidence, on the ground, that no notice of the special matter intended to be given in evidence had been given, agreeably to the 11th rule of the Court. The Court rejected the evidence, and this was the foundation of the present writ of error.

The opinion of the Court was delivered by

1818.

DUNCAN J. It is unnecessary to decide whether, when the evidence has been given before arbitrators on a trial under the compulsory arbitration act, and reduced to writing by the attorney of the plaintiff, and received without objection on such trial, it would not amount to notice of the special matter, within the rules of the Court of Common Pleas, because the evidence was clearly admissible on the plea of payment alone; and it was proof of direct payment, so far as respected the money paid to counsel in defending the ejectment, and the other expenses incurred; for the defendant offered to prove, that the plaintiff's intestate agreed with the defendant to deduct from the bonds any money that should be paid by the defendant to counsel. It was an order and direction by the plaintiff's intestate to pay money to others on account of these bonds; and that money so paid should be received as payment of the bonds. The 11th section of the rules of practice of this district, providing that on a plea of payment to a bond or specialty, the defendant may on the trial, in avoidance of the deed, give in evidence, that it was given without any or a good consideration, or obtained by fraud, or by a suggestion of falsehood, or by a suppression of the truth, but that of all such matters intended to be objected in avoidance of such bonds or specialties, the defendant shall give the plaintiff at least 30 days notice in writing before the trial, has no relation to the question. The evidence offered did not go in avoidance of the deed; it was not an offer to prove that the bond was obtained with any or a good consideration, or by fraud, or suggestion of a falsehood or suppression of truth; it was evidence of the direct matter put in issue. Defendant alleges that he has paid; plaintiff denies the payment; the defendant offered to prove his allegation, by shewing money paid on account of the bond, and by order of the plaintiff's intestate.

*Sunbury.*

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BARSON  
v.  
KEE  
and another  
administrator  
of IRVING.  
—  
Same  
v.  
Same.

Judgment reversed.

1818.

Sanbury.

## PIPHER and others against LODGE.

June.

IN ERROR.

The general rule is, that after a sale of land, and before a conveyance of the legal title, the vendor is the trustee of the vendee, and the set of limitations will have no operation. But where the vendor disavows the trust, and after having delivered possession to the vendee, makes a lease to a third person in opposition to the title of the vendee, and the lessee enters and holds possession, the jury may presume a disseisin, and if the vendee suffers 21 years to elapse without prosecuting his claim, it will be barred by the set of limitations.

THIS ejectment was brought in the Court of Common Pleas of Northumberland county, by Benjamin Lodge and others, the children and heirs of Jonathan Lodge, deceased, against William Pipher, the tenant of ——— Lloyd and Sarah his wife, formerly the widow of Josiah Haines, deceased, who was one of the children of Reuben Haines, deceased, to recover 150 acres of land near Northumberland town, on the north branch of the Susquehanna. Both parties claimed under Reuben Haines, who it was agreed was seised of the land in dispute. The plaintiffs made title under a purchase by Jonathan Lodge of Reuben Haines, by parol agreement, accompanied with possession and payment of the whole purchase money. Although the original agreement was by parol, the plaintiffs produced a receipt for the purchase money, dated September 7th, 1782, purporting to be signed by Reuben Haines, and containing a promise to make a deed to Jonathan Lodge. The defendant contended, that this receipt was forged, and this was the main point of fact disputed on the trial. The defendant claimed under a devise on 12th April, 1793, by Reuben Haines to his four children of the residue of his estate; a devise by one of the children who died, of his share to his two brothers and sister, equally to be divided among them; a deed bearing date March 24th, 1795, by Catherine Haines and Caspar W. Haines, two of the remaining children, conveying the premises in dispute to the third, Josiah Haines, for a valuable consideration; a devise by Josiah Haines on the 12th August, 1794, to his wife Sarah of one-fourth part of his estate absolutely, and of the rents and profits of another fourth part during her life, and an appraisement and valuation of the estate of Josiah Haines on 6th July, 1798, when this property was allotted to Mrs. Lloyd, his widow. Under these circumstances, the defendant's counsel contended, that Mrs. Lloyd was to be considered as a purchaser for a valuable consideration, without notice of Lodge's equitable title, and therefore protected by the recording acts. The Court, however, were of opinion, that

she was not such a purchaser, and an exception was taken to their opinion. The defendant relied also on the act of limitations ; having proved, that *Reuben Haines* in his life-time, after the supposed sale to *Jonathan Lodge*, made a lease to a certain person who entered on the premises, and proved also a possession in the devisees of *Reuben Haines*, for a considerable length of time. The counsel for the plaintiffs contended, that *Reuben Haines*, after the sale to *Jonathan Lodge*, became a trustee for him, and that consequently the act of limitations could have no operation during his life. Of this opinion were the Court of Common Pleas, who gave it in charge to the jury, "That during the time the land was in the possession of the vendor, who must be considered as trustee for the vendee, they both holding under the same title, there could be no adverse possession."

Several other exceptions were taken to the opinion of the Court below ; all of which were abandoned on the argument here, except the two above stated.

*Hall, Bradford* and *Huston*, for the plaintiff in error, contended, first, That the charge of the Judge was erroneous, because, when *Reuben Haines* gave up the possession, and received the purchase money, the contract was executed and the trust at an end, and that therefore when he afterwards entered, his possession was not that of a trustee, but adverse. A clear and direct trust is not, it was said, barred by any length of time, as between the trustee and *cestui qui trust* ; but the Court will not allow a man to make out a case of constructive trust at any distance of time after the facts and circumstances out of which it arose occurred ; on the contrary, not only in circumstances where the length of time would render it difficult to ascertain the true state of the fact, but where the true state of the fact might easily be ascertained, and relief would originally have been given on the ground of constructive trust, it is refused to the party, who, after a long acquiescence, comes into equity to seek relief. *Sugd. 272*, (2d Am. edit.) Chancery applies the rules of law to equitable cases in relation to limitations of time. Laches and neglect are equally discountenanced there and in courts of law, and nothing can demand the assistance of a court of chancery, but conscience and reasonable diligence. A bill therefore for a review of error apparent, will not lie after twenty

1818.

*Sunbury.*

PITNER

v.

LODGE.



1818. years. *Smith v. Clay.*(a) No particular length of possession by a mortgagee will bar the mortgagor's right of recovery, and a variety of cases shew different periods of time, within which it has been held necessary, according to circumstances, to file a bill to redeem. As, however, twenty years will bar an entry, equity seems to have adopted the same rule in relation to a redemption under ordinary circumstances. Note to *Cook v. Arnham.*(b) *Knowles v. Spence.*(c) *Aggas v. Pickerill.*(d) *Anonymous*———.(e) *Boteler v. Allington.*(f) Negligence is no less fatal to a bill for a specific performance. Under a great change of circumstances equity will not compel a specific performance of what otherwise it would have decreed. *Attorney-General v. Day.*(g) In *England*, it is not usual to allow twenty-one years for a bill for a specific performance. Six, eight or ten years will bar such a bill, except under particular circumstances; and in this county ten years have been held too long. *Cringan v. Nicolson's executors.*(h)

In equity, the heir is deemed the trustee of the devisee; but if the devisee acquiesce a long time in his possession, equity will not relieve. *Sugd.* 135. (2d Am. edit.) After such a length of time as has elapsed in this case, equity would bar the vendor's right of recovery, unless a case of unquestionable trust were made out. Much less will a party be entitled to recover after twenty-one years possession, by one who enters after the relation of trustee has ceased by the complete execution of the contract, and holds the land adversely. If *Reuben Haines* had made a deed to *Jonathan Lodge*, and afterwards entered on him, his possession would have been adverse; and surely it is equally so, admitting him to have given *Lodge* the disputed writing under which the plaintiffs claim. Where part of the purchase money is unpaid, the vendor retains an equitable lien for the balance, against a purchaser with notice that the money is unpaid; but as the whole of the purchase money was in this instance paid, the entry of *Haines* must have been adverse. The rule as to actual ouster of a tenant in common by his companion, is applicable to the case of vendor and vendee, where the possession of the vendor is adverse; and this rule is, that

(a) *Ambler*, 647.  
 (b) 3 *P. Wms.* 287.  
 (c) 1 *Eq. Ab.* 315.  
 (d) 3 *Atk.* 225.

(e) 3 *Atk.* 318.  
 (f) 3 *Atk.* 453.  
 (g) 1 *Vez.* 218.  
 (h) 1 *Hon. & Mansf.* 492.

after a long uninterrupted possession by one tenant in common without any account to or claim set up by his companion, an actual ouster of the co-tenant is to be presumed. *Fisher v. Prosser*.(a) It should therefore have been left to the jury to determine, whether *Reuben Haines* entered as a disseisor, and if he did the land passed by his will.

1818.

*Sunbury.*


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 PIPER  
v.  
LODEX.

It was argued, secondly, that the widow of *Josiah Haines* was to be considered as a purchaser for a valuable consideration without notice of *Lodge's* equitable title. *Josiah Haines* was himself a purchaser for a valuable consideration from his brothers and sister. He devised one-fourth of his estate to his wife absolutely, and one-fourth during life, and she accepted the land in controversy *inter alia*, in lieu of dower, without any knowledge of an adverse claim. The purchaser of the legal estate is not to be affected by a latent equity. *Wickox v. Calloway*.(b) And the grantee even in a voluntary conveyance made by a purchaser for a valuable consideration without notice, shall hold discharged of a trust. *Lowther v. Carleton*.(c) Here Mrs. *Lloyd* had the legal estate, and as strong an equity as the plaintiffs, and therefore must prevail over an equitable title which has been so long slept upon, and of which she had no notice. The writing upon which *Lodge's* claim is founded, might have been recorded under our acts of assembly, and ought to have been, to convey notice to subsequent purchasers. A tenant in dower, is a purchaser for a valuable consideration. Marriage is a sufficient consideration for the settlement of an estate, and a subsequent sale for a valuable consideration, is not only invalid, against those who are within the consideration, but against those also who are not; if the limitations to them are necessary to give effect to those which are within the consideration. *Sugd.* 435. 468. 476. (2d Am. edit.) So far are the rights of those who derive an interest through marriage protected, that a *feme covert* is not compellable after the death of the baron to complete a fine which he had covenanted she should execute, though she had acknowledged the fine before a Judge, but the baron died before the term; because her dower is to be protected.(d) A widow too shall be endowed of an equity of redemption though the mortgage was made before marriage, on paying a third of the mortgage money, or keeping down a

(a) *Comp.* 217.(b) 1 *Wash. Rep.* 41.(c) *Cas. Temp. Tal.* 188.(d) 1 *Eq. Ab.* 61.

1818. *third of the interest. Banks v. Sutton.*(a) 2 *Pow. on Cont. Sumbury.* 58. On the same principle, if a grantee in a voluntary deed gain credit by the conveyance, and a person is induced to marry her on account of the provision made for her in the deed, such conveyance on marriage ceases to be voluntary, and becomes good against a subsequent purchaser for a valuable consideration. *Sterry v. Arden.*(b) Upon partition made, the situation of children is altered. If one take the whole, and pay the others their shares, he is a purchaser for a valuable consideration, at least as to all but his own share. These principles are obviously applicable to the present case. *Josiah Haines* was a purchaser for a valuable consideration from his brothers and sister, without notice, and therefore protected against the pretended equitable title of the plaintiffs; and his widow was also such a purchaser, having relinquished her dower and taken this devise in lieu of it.

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LODGE.

*Greenough and Watts*, for the defendants in error, after adverting to the evidence to shew, that it did not prove a possession of twenty-one years in *Reuben Haines*, and those who claimed under him, insisted, that if it did, his possession could not be considered adverse, but that after payment of the purchase money, he was a mere trustee for *Lodge*, the contract being incomplete until the execution of a conveyance. Equity regards that as done, which is agreed to be performed, and consequently when an estate is contracted to be sold, the vendor is regarded as the trustee of the vendee until a conveyance is made. *Sugd.* 130. (2d Am. edit.) 2 *Pow. on Cont.* 38. The act of limitations does not bar a trust estate. Equitable circumstances may, indeed, exist, arising from length of time, which will bar the claim of *cestui qui trust*, but between the trustee and *cestui qui trust* there can be no adverse possession on which the statute of limitations will operate. *Sugd.* 266. 273. (2d Am. edit.) The situation of the plaintiffs below, is like that of one who has filed a bill for a conveyance, which equity would undoubtedly decree on the basis of the receipt. To give effect to the principles of equity in the absence of a court of chancery, the courts of *Pennsylvania* must consider the conveyance as executed, and permit the plaintiffs to recover through the medium of an ejectment, against those who come in under

(a) 2 *P. Wms.* 700.

(b) 1 *Johns. Cha. Rep.* 261.

the vendee, and who as well as himself are to be regarded in the light of mere trustees. 1818.

*Sunbury.*

PIPER  
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On the second point it was contended, that it was by no means clear, that *Reuben Haines* intended to devise the disputed land to *Josiah Haines*. The plaintiffs in error claim under a general devise of the residue of the estate to all the children equally. *Josiah* took the *Northumberland* estate, as his share on a partition of the whole estate. He was, therefore, not a purchaser for a valuable consideration, and if he were, Mrs. *Lloyd* could have no title, because the will of her husband, under which she claims, bears date before the deed from *Caspar W. Haines* and *Catherine Haines* to *Josiah Haines*. Every partition implies a warranty. If, therefore, the estate of *Josiah Haines* should lose this property, the other heirs must contribute to repair the loss. *Reuben Haines* having sold to *Lodge*, the land did not pass by his will. He was a trustee for *Lodge*, and if a trustee devise all the residue of his estate, the trust will not pass. Nor is the widow of *Josiah Haines* in a better situation than himself. Her case is not so strong as if she had taken this estate as *dower*; for if she is deprived of it, she may have recourse to the heirs of her husband for compensation. She took as devisee, and was therefore not in the nature of a purchaser for a valuable consideration; because all those who come in under one who has entered in articles to sell land, are bound. 2 *Pow. on Cont.* 57. The Court below were, therefore, right in saying, that the recording acts did not apply to this case, because there was no purchaser for a valuable consideration.

The opinion of the Court was delivered by

TILGHMAN C. J. (After stating the leading facts.) After a sale, and before conveyance of the legal title, the general rule is, that the vendor is a trustee for the vendee; and while his possession can be reasonably supposed to be in accordance with the trust, it should be construed for the benefit of the *cestui qui trust*, and consequently the act of limitations would have no operation. But where he who was the trustee, openly disavows the trust, the case is different; and especially, where, as in the present instance, the vendor, after having delivered possession to the vendee, makes a lease to a third person, in opposition to the title of the vendee, and the

1818. lessee enters and holds the possession. This is notice to the vendee, that his title is denied, and if he suffers 21 years to elapse without prosecuting his claim, I see no reason why the jury should not presume a disseisin; in consequence of which the act of limitations would take effect. The law of tenants in common, as decided in *Fisher, &c. v. Prosser, Cowp. 217*, bears some analogy to the present question. As long as one tenant in common, who is in possession of *the whole*, acts in such a manner as not to deny the title of his partner, he shall be presumed to hold as tenant in common, and the act of limitations will not attach; he may receive all the profits, and yet not deny that he is accountable. But where his actions are not reconcilable with the right of his co-tenant, where he declares that he claims for himself *exclusively*, refuses permission to the other to enter, and denies that he is accountable for the profits, the presumption of holding as tenant in common fails, and a contrary presumption arises, viz. that he has *ousted* his companion, in consequence of which the act of limitations takes effect. It is not for this Court to say, whether the conduct of *Reuben Haines* was such as to raise a presumption of an *ouster*; the only question is, whether, circumstanced as he was, it was *possible* for him to oust *Jenathan Lodge*, so as to let in the act of limitations. And I have no doubt but it was. When the possession was delivered, and the purchase money all paid, there was no pretence for the re-entry of the vendor, or for his making a lease to a third person; nor is it possible to reconcile either of those actions, with the duty of a trustee. It would be a misconstruction of the act for the limitation of actions, to say, that because the vendor had once stood in the situation of a trustee, therefore he should stand so for ever, and lose all benefit of the act. I am, therefore, of opinion, that there is error in the charge of the Court of Common Pleas. The defendant insisted also at the trial, that Mrs. *Lloyd*, the devisee of her former husband, *Josiah Haines*, was to be considered as a purchaser for a valuable consideration, without notice of the equitable title of *Lodge*, and therefore not to be affected by it. The Court of Common Pleas were of opinion, that she was *not to be so considered*. I am really at a loss what to say on this point; as no facts were found by the jury, and it does not appear to me, that the evidence inserted in the record, brings before us a case stated with sufficient

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v.  
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accuracy to decide, whether Mrs. Lloyd was or was not a purchaser for a valuable consideration. In general, a devisee is not a purchaser for a valuable consideration. But Mrs. Lloyd claimed, not only as devisee, but by virtue of a deed from the executors of *Josiah Haines*; and *Josiah Haines* himself claimed, not only as devisee of his father *Reuben*, but under a deed from the other devisees of his father. I must decline giving any opinion on this point, as the evidence does not enable me to see my way with sufficient clearness. But having no doubt on the first point, I am of opinion, that the judgment should be reversed, and a *venire facias de novo* awarded.

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v.

LOBB.

Judgment reversed, and a *venire facias de novo* awarded.

### MACILL and another against KAUFFMAN.

IN ERROR.

June.

THIS case came before the Court on several bills of exceptions to the admission of evidence by the Court of Common Pleas of *Mifflin* county, where it was an ejectment for 100 acres of land in *Fermanagh* township, to which *William* and *Robert Magill*, who were also plaintiffs below, claimed title under an application in the name of *Andrew Calhoun*, dated *January* 8th, 1768. The defendant claimed under an application in the name of *James Purdy* and *James Patterson*, in trust for a certain presbyterian congregation, dated *March* 30th, 1767. The Rev. *Hugh Magill*, deceased, the father of the plaintiffs, under whom they derived their title, was pastor of the said congregation, and resided on the land in dispute, in a house built by the congregation. The plaintiffs alleged, that the disputed land was included in *Calhoun's* survey, and not included in the survey in trust for the congregation; that when their father was informed of this, he called the congregation together, told them of *Calhoun's* claim, and requested them to purchase the land; that the

A cause is well removed by writ of error, though the recognition of bail be not conformable to law; but the writ will not operate as a supersedeas.

If a witness reside out of the state, what he swore on a former trial between the same parties, where the same point was in issue, may be given in evidence.

The acts and declarations of trustees and agents of a congregation, in their official

capacities, both before and after its incorporation, are evidence against those whom they represent. But their confessions, made, not in the transaction of the business of their principal, are not evidence.

1818. congregation declined making the purchase, in consequence of which he purchased it for himself, for forty pounds, and obtained a deed of conveyance from *Andrew Calhoun*, dated *May 16th, 1786*. On the other hand it was contended, that the disputed land was included in the survey for the congregation, and always claimed as such; and that *Hugh Magill* had acted fraudulently in obtaining a conveyance from *Calhoun* and setting up a claim in opposition to them; because in his old age, when he was too infirm to perform the duties of a pastor, they permitted him to retain possession of the glebe, including the land in controversy, for his life, and moreover paid him an annuity of thirty dollars a year. Parol evidence was given to prove these facts. The plaintiffs then offered to prove by the oath of *William M'Allister*, a member and one of the trustees of the congregation, who were incorporated in the year 1807, that the congregation did not claim the land in question, as included in their survey, until long after the purchase made by *Hugh Magill*. This evidence was rejected by the Court, and an exception taken. The plaintiffs also offered evidence of the confessions of the agents of the congregation, made at a time when they were not acting in their official capacity, which was likewise rejected. In the course of the trial, the defendant offered evidence of what had been sworn to by *David Nelson*, a witness who had been examined on a former trial between the same parties, in which the matter in controversy was the same, and who it was admitted, then resided in the state of *Ohio*. This evidence was objected to, but the objection was over-ruled, and the Court sealed a bill of exceptions.

On the return of the writ of error, *Watts*, for the defendant in error, moved to quash it, because the recognisance of bail was not conformable to law; but THE COURT, without deciding on the recognisance, refused to quash the writ, because even supposing the recognisance to be void the suit was well removed, although the writ of error would not operate as a *supersedeas*.

The questions presented by the bills of exceptions were argued by *Huston*, for the plaintiffs in error, and by *Hale* and *Watts*, for the defendant in error.

The opinion of the Court was delivered by

1818.

TILGHMAN C. J. On the trial of this ejectment, the Court *Sunbury.*  
of Common Pleas admitted evidence of what had been sworn  
by *David Nelson*, a witness examined on a former trial be- *MAGILL*  
tween the same parties, wherein the same matters were in *v.*  
issue. At the time of the trial, *David Nelson* was living in *KAUTZMAN.*  
the state of *Ohio*. The counsel for *William* and *Robert*  
*Magill*, the plaintiffs below, objected to the evidence, and  
excepted to the opinion of the Court.

I do not find any express decision upon this point. In several treatises upon the law of evidence, and in several adjudged cases, it is said, in general, that evidence shall not be received of what was sworn by a witness at a former trial, unless it be proved that he is dead, or not to be found after diligent search. *Peake's Evid.* 58, 59. *Phill. Evid.* 199. *Tilley's case*, *Salk.* 286. *Benson v. Olive*, 2 *Str.* 920. In one case indeed, (*Green v. Gatewick*, *Bull. N. P.* 243. *Phill. Evid.* 199,) the evidence was admitted, the witness having been subpoenaed and not appearing, and the Court having some reason to suspect, that he was kept away by the influence of the adverse party. To all these general rules there are exceptions, and the question is, whether the circumstances of the witness being out of the state, and consequently out of the jurisdiction of any Court of *Pennsylvania*, be good ground for an exception. Reasoning from analogy, we may derive light from cases which have been decided by this Court. In *Clark v. Sanderson*, 3 *Binn.* 192, we determined, that where the subscribing witness to an instrument of writing is *out of the state*, his hand-writing may be proved, although the general rule is, that if the witness be living, he must be examined. To preserve consistency of principle, it appears to me, that in the present instance we should consider the residence of the witness in the state of *Ohio*, the same thing as his death, for the purpose of letting in the evidence of what he swore on the former trial. It is true, that it might perhaps be more advantageous to the adverse party, to have him examined again. But that objection was equally forcible, in *Clark v. Sanderson*. If the subscribing witness had been examined, he might possibly have disclosed some fact material to the defendant. But the general convenience of admitting the secondary evidence prevailed with the Court. It is to be remembered, that it is in the power of



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the adverse party, to prevent the secondary evidence, by sending a commission to examine the witness in the state where he resides. And if he will not do this, it will tend to the easier administration of justice, to admit proof of what the absent witness had sworn, on an occasion, where there was an opportunity of cross-examining him. If in this case, *the deposition* of the witness had been taken on the former trial, it might undoubtedly have been read in evidence on this trial, by virtue of the "Act further to regulate proceedings in courts of justice," passed 28th March, 1814. The act does not indeed extend to the case of a witness who had been *examined viva voce*; but if the deposition, and the examination in Court, are put upon the same footing, so far as regards the letting in of secondary evidence, the law will certainly be more simple and uniform. I am, therefore, of opinion, that the evidence was properly admitted.

There was another exception taken by the plaintiff to the opinion of the Court below, to understand which it will be necessary to state the nature of the titles, both of plaintiff and defendant.

[Here his Honour stated the titles.]

The reasons relied on by the defendant in error, for rejecting the evidence is, that a *corporation* can do no act but under their corporate seal; and that, before the congregation were incorporated, they could only act as a body, when assembled for purposes of business; and therefore an individual could neither say, or do, any thing to affect their rights. But this argument is by no means satisfactory. The evidence was offered, not for the purpose of proving the acts of an individual, but the acts of the *congregation* before they were incorporated, and of the *corporation*, afterwards. Both the congregation and the corporation must necessarily have transacted their business by means of agents. And with respect to the possession of this land, and its boundaries, the acts and declarations of the trustees and agents of the congregation, both before and after their incorporation, would be powerful evidence. Besides, it does not appear but that *William M<sup>r</sup> Allister*, if he had been examined, might have proved the very acts of the congregation, before their incorporation, when assembled on business. Other witnesses had been examined, in order to prove what passed at such meetings; and very properly. It does not appear clearly by the record,

what was the precise nature of the facts to be proved by 1818.  
*M<sup>r</sup> Allister*. The expressions are, *that the plaintiffs offered to* *Sunbury.*  
*prove by William M<sup>r</sup> Allister, that the congregation did not* *MAGILL*  
*claim the land in question, &c.* which may be understood as *v.*  
*referring either to the acts of the congregation itself when* *KAUFFMAN.*  
*assembled, or of its trustees or agents. But either would*  
*have been evidence. The acts of an agent or trustee, within*  
*the bounds of his authority, must affect the principal. I am*  
*of opinion, therefore, that the evidence should have been*  
*received.*

There was other evidence offered by the plaintiffs, not of the acts of the agents of the congregation, or of their declarations while transacting the business of the corporation; but of *confessions* made by them *afterwards*. This evidence was rejected, and I think with good reason. An agent is authorised to *act*; therefore his *acts, explained by his declarations during the time of action*, are obligatory on his principal; but he has no authority to make *confessions* after he has acted, and therefore his principal is not bound by such confessions. Neither would the congregation be affected by the *declaration* of one of its members as to what had passed at a meeting of the congregation. This declaration would be but hearsay evidence. The facts respecting what passed at the meeting should be proved by the oath of some person who was present, unless they were reduced to writing, and then the writing itself would be the only admissible evidence. I am of opinion on the whole, that the judgment should be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

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Sunbury.SPALDING *against* IRISH.4 SR 322  
217 '547

June.

IN ERROR.

An award  
ought to be  
certain and  
final.

If arbitra-  
tors award a  
sum of money  
to be paid as  
the considera-  
tion of a tract  
of land, and  
add that all  
legal and  
equitable  
claims against  
the land are  
to be deduct-  
ed from the  
award, with-  
out finding the  
amount of  
such claims,  
the award is  
bad.

IT appeared from the record which was returned on a writ of error to the Court of Common Pleas of *Bradford* county, that this was an action of debt on bond brought by *Job Irish* against *Harry Spalding*, in which a statement was filed by the plaintiff on the 24th *August*, 1815, in these words, "Plaintiff's demand is founded on a bond under seal, dated the 30th day of *December*, 1814, for the sum of three thousand dollars lawful money of the *United States*, all of which plaintiff avers is yet due and yet unpaid, and this he is ready to verify." The defendant prayed oyer of the bond and condition, which were placed upon the record. The condition was as follows:—"That if the above bounden *Harry Spalding*, his heirs, executors, or administrators, shall well and truly pay, perform, and abide by the award of *A. Simons, C. Brown* and *G. Hewitt*, in a certain cause to them submitted by the said *Irish* and the said *Spalding*, and give his said *Spalding's* promissory notes to said *Irish* or bearer on interest for the sum or sums, and at the time or times by them awarded, then this obligation to be null and void, or else, &c."

The defendant pleaded no such award, to which the plaintiff replied, that there was such an award, and set it forth together with the agreement, in pursuance of which it was made.

The agreement which was under seal, and dated the 30th *December*, 1814, recited, that an action of ejectment had been brought in the Court of Common Pleas of *Bradford* county, for a certain tract of land, by *Job Irish*, the defendant in error, against *Orr Scoville* and *Silas Scoville*, and that *Harry Spalding*, the plaintiff in error, had purchased the said land of *Orr Scoville*. It was therefore agreed between *Irish* and *Spalding*, that the former should withdraw his action of ejectment, and by deed quit claim and relinquish to *Spalding* all his claim to the said land, and also to another tract of land adjoining thereto; and that *Spalding* should give his bond

in a certain sum to *Irish*, to be put into the hands of certain arbitrators, who were appointed to meet the parties at a certain time and place, and who or a majority of whom were invested with power, "after hearing the parties, their proofs and allegations, to award such sum or sums of money to the said *Irish* as they should find just and right for the said *Spalding* to pay said *Irish* for his claim or interest in said two tracts of land, the payment of which was to be divided into three annual instalments, with interest; each party to pay their own costs and one-half the arbitrator's fees, which award when so made was to be final and conclusive on both parties." To this agreement, there was the following: *Nota Bene*, "All liens by judgment or mortgage to be considered or deducted from the award of said arbitrators."

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 v.  
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The arbitrators met the parties at the time and place appointed, and after several adjournments made this award, "Met the parties agreeably to the above agreement, and we the above-named arbitrators, after considering of the cause submitted to us by the above rule, do in pursuance thereof adjudge and award as follows: That the above named *Job Irish* do recover of the above named *Harry Spalding* the sum of two thousand five hundred and eighteen dollars 96 cents, to be paid agreeably to the above rule, in three annual instalments, as follows, to wit, &c. "And we do further adjudge and award, that all legal and equitable claims against the said *Job Irish*, remaining liens on the said tract of land in the above rule described and mentioned, be deducted from the above award, in equal proportions from each of the above several instalments as they severally become due. Witness our hands and seals, this 23d day of June, 1815." As a breach of the condition of the bond the plaintiff alleged, that the defendant "had not complied with and performed the said award according to the tenor and effect thereof."

The defendant filed a demurrer in the following words, "And the said *Harry Spalding*, as to the plea of the said *Job Irish* by him above pleaded, in reply to the plea of the said *Harry Spalding* by him above pleaded in bar, says, that the plea by him so as above pleaded, and the matters therein contained, are not sufficient in law to maintain the said action of the said *Job Irish* against him the said *Harry Spalding*, to which said replication in manner and form as the same is set forth, the said *Harry Spalding* is under no necessity, nor is

1818. he obliged by the law of the land to answer. Wherefore,"  
*Sunbury.* &c. The defendant at the same time added a plea, "that the  
 SPALDING defendant ought not to have or maintain his action aforesaid  
 v. in manner and form aforesaid by him prosecuted, but the  
 IRISH. agreement in writing aforesaid, and the award aforesaid, ought to have been proved, filed, and proceeded upon in the manner prescribed, and according to the provisions of the act of this Commonwealth of 21st *March*, 1806." The record then merely stated, that the plaintiff joined in the demurrer. The cause was argued at *December Term*, 1816, on the following grounds. 1. That the award was not final. 2. That it was uncertain. 3. That the award should have been filed, agreeably to the act of assembly of 21st *March*, 1806. The cause was held under advisement by the President of the Court, who was by the agreement of the parties to transmit his opinion in writing before the next Term, and judgment was to be rendered on the opinion, on the *Monday* of the *February Term* following.

It was conceded, that the defendant had received a deed from the plaintiff and was in quiet possession of the land.

The opinion of the Court was filed at *February Term*, 1817, and judgment entered in favour of the plaintiff; and on a rule to shew cause why an execution should not issue, the Court below, after fully stating the facts and the pleadings, delivered the following opinion. "The two first points as to the award not being final or certain have been argued on the same grounds, and it is contended, because the liens on the land have not been ascertained, the award is neither *certain* nor *final*. Lien is a technical term in *Pennsylvania*. Lien is either by judgment, recognisance, mortgage, or by a balance of purchase money due, or to become due and unpaid. The agreement in this case is, that liens by judgment or mortgage are to be deducted, and the award is, that all equitable claims against the said *Irish* remaining liens on the tract of land in the above rule described and mentioned to be deducted, &c. If such liens exist, they may be ascertained by the proper officer, and it is as certain as the costs of an action or the charges of a voyage, or to pay the executors of *J. D.* deceased. *Grier v. Grier*, 1 *Dall.* 174; or agreeably to the decision of the board of property. *Santee v. Keister*, 6 *Binn.* 36; which have all been recognised as sufficiently certain by the Supreme Court of this state. As to the last

point, it appears to me it never was intended by the parties, 1818.  
 that a judgment should be entered on this award or report *Sunbury.*  
 of the arbitrators, and that therefore it was a proceeding ex- *SPALDING*  
 clusively at common law, and not according to the act of *v.*  
 1806. The construction contended for by the counsel for *IRISH.*  
 the defendant, would change the agreement of the parties,  
 and to allow of this would be enabling the defendant to take  
 advantage of his express agreement and submission.

“There was one other ground touched by the counsel of  
 the defendant: That there are not sufficient averments in  
 this case by the plaintiff on the record to enable him to reco-  
 ver. The defendant having demurred generally, I think the  
 Court should not be very astute in discovering technical ob-  
 jections in his favour. If there had been any mistake in  
 point of law or fact, or misbehaviour in the arbitrators, or  
 any other ground that in *England* would give relief in a court  
 of chancery, the defendant could have brought it before a  
 jury, but having brought his cause in this way before the  
 Court, although the pleadings are not very perfect, yet I  
 think from the whole view of the record, I am bound to give  
 judgment for the plaintiff. But the Court order and direct,  
 that for the present no execution issue, so that the party may  
 ascertain the liens, if any, and that the defendant may have  
 an opportunity of complying with the award.”

A writ of error being taken out, in addition to the general  
 errors, the following errors were assigned.

1. That there was a mis-trial in the Court of Common  
 Pleas, there being no issue, nor such pleadings in the cause  
 as a judgment could be rendered upon.

2. That there was no demurrer; because no cause of de-  
 murrer was set forth, which ought to have been done accord-  
 ing to the statute of 27 *Eliz.* c. 5, and 4 and 5 *Anne*, c. 16.

3. That there was no joinder in demurrer appearing on the  
 face of the record, nor will the recital of the Judge in his  
 written opinion supply the omission.

4. The judgment below was premature, and not warranted  
 by the pleadings, in this, that the defendant below, after the  
 supposed demurrer, tendered an additional special plea, *puis*  
*darrien continuance*, relating to a matter in *pais*, to which no  
 replication was made.

1818. The cause was argued in this Court, by *Kinney, Hall and Sumbury*, for the plaintiff in error, who referred to *Sellon's Prac.* 270, 271, and *Kyd on Awards*, 129, and by

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*Hale, Baldwin and Huston*, for the defendant in error, who cited *Munro v. Alaire*.(a) *Grier v. Grier*.(b) *Purdon v. Delavan*.(c) *McKinstry v. Solomons*.(d) *Gonzales v. Deavens*.(e) *Santee v. Keister*.(f) *Hart v. Weston*.(g) 1 *Chitty's Plead.* 325, 326. 400. 643, 644, 645, 646, 647. 1 *Tid. Prac.* 648, 649. 27 *Eliz. c. 5.* 4 *Anne, c. 16.* *Kyd on Awards*, 133. 135. 186. 199. 208. 1 *Bac. Ab.* 232, (*Wils. edit.*)(h) Act of 21st March, 1806.(i)

The opinion of the Court was delivered by

DUNCAN J. If the award in this case were valid, there are so many fatal objections to this judgment, the proceedings are in all respects so substantially erroneous, that the plaintiff below could not on the state of the record be entitled to any judgment. But as the Court entertain no doubt on the merits of the award, and are not willing to put the parties to the expense of a new suit, on this award, in which there could not be a recovery in any form of action or pleading, they think they best administer justice by deciding on the award, as if the whole case of the plaintiff had been stated on the record, and breaches had been legally assigned. The case would then stand thus:—In an action of ejectment in which *Job Irish* was plaintiff, and *Orr Scoville* and *Silas Scoville* defendants, the following agreement was entered into between *Job Irish* and *Harry Spalding*. [His honour here referred to the agreement.] In pursuance of that agreement, on the same day, a bond in the penalty of \$3000, was executed by *Harry Spalding* to *Job Irish*, with the following condition. [His honour then stated the condition.] On the 15th June, 1816, the arbitrators made the following award. [Here he read the award.] The question which this Court are now to decide is, Is this a good and binding award?

Connecting the agreement in the ejectment cause with the arbitration bond, it is evident to me, that the arbitrators were

(a) 2 *Caines*, 327.

(b) 1 *Dall.* 174.

(c) 1 *Caines*, 304.

(d) 2 *Johns. Rep.* 60.

(e) 2 *Teator*, 539.

(f) 6 *Binn.* 36.

(g) 5 *Burr.* 2588.

(h) 1 *Vent.* 87.

(i) 4 *Sm. L.* 326.

to find and ascertain the sum which *Harry Spalding* was to pay *Job Irish*, for his interest in the land ; the *nota bene* to the agreement satisfies my mind, that one great object of the award was to ascertain the amount of the liens. "N. B. All liens by judgment or mortgage are to be considered or deducted from the award of the said arbitrators." Who were to consider them? Who deduct them? The arbitrators; for if this was not to be done by the arbitrators, the essence of a good award would be wanting. Awards are to put an end to the controversy between the parties; they are to be certain and final.

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*Sambury.*

SPALDING  
v.  
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The submission was to give notes for the sum to be awarded, "and give his, said *Spalding's*, promissory notes to said *Irish* or bearer, for the sum or sums by them awarded." The certain sum to be paid, was the matter submitted to the arbitrators; and the award is, that *Irish* do receive of *Spalding* \$2518 96 cts. at three payments; but they further adjudge and award, that all legal and equitable claims against the said *Job Irish* remaining as liens on the land, be deducted from the above award, in equal proportions from each instalment; thus extending the claim beyond liens of judgments, and mortgages, to every equitable claim which would be a lien on the lands in the hands of *Irish*, as purchase money due for the lands, mortgages and agreements, and conveyances not recorded. Whatever the amount might be, they were to be deducted from the sum awarded; thus leaving them to future examination. When, how, or by whom are these to be ascertained and deducted? Is *Spalding* to give his notes payable to *Irish* or bearer for the whole sum, and in the suits brought on these notes to have them deducted? This would either enable *Irish* to impose on the world by negotiating the promissory notes payable to bearer, for a certain ascertained sum, when the debt was not ascertained, but left to be afterwards ascertained, and when ascertained, to be deducted proportionably from the notes, or expose *Spalding* to the risk of being obliged to pay the notes to an innocent indorsee without defalking the amount of those liens. The notes by the condition are to be given for the sum awarded; that sum then, is to be the absolute unconditional sum awarded by the arbitrators, after the deduction of the liens, and this is the clear and plain construction of the arbitration bond, connected with the agreement in the ejectment cause. He cannot



1818. ascertain the liens ; if judgments, they may be for the penalty ;  
*Sunbury.* if mortgages, part paid ; the judgments and mortgages may be  
*SPALDING* fully discharged, though satisfaction be not entered ; besides  
*v.* latent contracts ; besides the liens in equity in the hands of  
*IRISH.* *Irish.* If it be, that by the award he is not to give notes,  
but the money is to be recovered on the award, then they  
must be deducted by a jury ; thus leaving open for future  
discussion the very matter which was submitted. The award  
in its very nature ought to be wholly decisive ; the arbitrators  
cannot delegate to others, that which is submitted to them ;  
nor could the arbitrators refer a matter to their own future  
judgment or decision. An award, that if the plaintiff prove  
certain articles against the defendant, then he shall pay so  
much as the plaintiff was damnified thereby, is not final ; or  
if the defendant shall make out on oath before a Judge any  
disbursements made on account of the plaintiff, that the plain-  
tiff shall pay them ; but in case the defendant does not prove  
them within a limited time, the parties shall give general  
releases, this is not a good award. *Selby v. Russell, Comb.*  
456. Nor would an award that the defendant shall pay to  
the plaintiff such a sum of money, unless within twenty days  
the defendant should exonerate himself by affidavit from  
certain payments and receipts, in which case he was only to  
pay a certain other less sum, be good, because it is uncertain  
and inconclusive. A mere mistake in calculation will not  
vitiate an award in toto, for that may be corrected ; but  
where a substantial part of the matter submitted is left un-  
decided, so that the arbitrators do not make a final conclusion  
of the matters in difference, this avoids the whole. There is  
a prevailing principle in the construction of awards ; that they  
should be final in every case without any reference to a  
future examination and decision, except the award of costs,  
which are always to be taxed by the officers of the Court.  
12 *Mod.* 139. *Willes*, 166. 4 *Dall.* 74. But an award that  
one party shall pay the reasonable expenses of another in car-  
rying on his suit, is ill.

On the ground of the award not being final, ascertained  
and decided, but leaving the matter submitted open for fu-  
ture examination, the judgment must be reversed.

Judgment reversed.

END OF JUNE TERM, 1818.

# CASES

IN THE

## SUPREME COURT

OF

### PENNSYLVANIA.

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WESTERN DISTRICT, SEPTEMBER TERM, 1818.

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SAMPSON *against* SAMPSON and others.

1818.  
Pittsburgh.

IN ERROR.

*Wednesday,*  
*September 9.*

ON the return of the record of this ejectment from the Court of Common Pleas of *Westmoreland* county, it appeared, that the defendants in error, who were plaintiffs below, claimed the land in dispute under the will of their father *John Sampson*, who had filed an application for it on the 3d *April*, 1769. On the 8th *April*, 1788, he took out a warrant in the names of his sons *Charles* and *James*, the former of whom was the defendant, which was surveyed upon the land. It was admitted, that the warrant was taken out and paid for by the father, and the question on which the controversy depended was, whether there was a resulting trust in his favour, or whether it was intended as an advancement to his children. To prove that it was intended as an advancement, the defendant

A warrant was taken out and paid for by a father in the name of his sons, and on ejectment brought, the question being, whether the warrant was designed by the father as an advancement to his sons, or whether a trust resulted to him; it was decided, that evidence might be given of acts of ownership on the

land by the father, and of declarations to explain those acts, in order to rebut the presumption, that the land was intended as an advancement.

If a witness state his impressions from particular circumstances, without stating what those circumstances were, *e. g.* if he state, "that in all the different conversations with J. S. he always understood the said J. S. allowed the land in dispute to be the property of C. S." and nothing more, his deposition cannot be read.

The Court may express an opinion on the facts of a case, without at the same time informing the jury, that they may and ought to judge for themselves; but nothing should appear in the charge from which the jury may reasonably infer, that they are precluded from considering the facts.

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1818. gave in evidence acts of ownership exercised by himself, declarations made on a variety of occasions by his father, and the general reputation of the country, that the land belonged to him. Among other evidence the deposition of *George M<sup>c</sup>Williams* was offered, which stated, that *John Sampson* had told him, that he had taken out a warrant in the names of *Charles* and *James*, for the land in dispute, and "that in all the different conversations with the said *John Sampson*, he always understood that he the said *John Sampson* allowed the land now in dispute to be the property of the said *Charles* and *James Sampson*." The plaintiff's counsel objected to the reading of this deposition, and it was rejected by the Court.

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*SAMPSON*  
*v.*  
*SAMPSON*  
 and others.

For the purpose of rebutting the evidence given by the defendant, the plaintiffs offered the deposition of *Robert Johnson*, who testified, that about the year 1790, he accompanied *John Sampson* and one *Samuel M<sup>c</sup>Millan*, to look at some land which *Sampson* had offered for sale, and that he heard them agree upon the price for 100 acres, which included the land in dispute. Some time after the bargain was made, however, *M<sup>c</sup>Millan* becoming apprehensive that he should not be able to make the payments, gave up the land, and *Sampson* at a subsequent period declared, that he was wrong to do so, as he always intended to be easy with respect to the payments, and to have taken a great part of it out in taylor's work. The admission of this deposition was opposed by the defendant's counsel, but the Court permitted it to be read, and an exception was taken to their decision.

The President of the Court, after having reviewed the evidence, concluded his address to the jury by observing, "*Upon the whole, the evidence on the part of the defendant appears to be very loose; too much so to entitle him to a verdict.*"

The jury found a verdict accordingly in favour of the plaintiffs, and the cause being removed by writ of error, the propriety of the charge, and of the opinion of the Court on the points of evidence stated above, formed the subjects on which this Court were called upon to decide.

*Foster*, for the plaintiffs in error.

*Baldwin*, contra.

TILGHMAN C. J. having been absent during the argument, 1818.  
gave no opinion.

*Pittsburgh.*

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GIBSON J. The question was, whether a trust resulted to *John Sampson* who paid the purchase money and took out a warrant for the land in dispute on the 8th April, 1788, in the names of his sons *Charles* and *James* the defendants; or whether he intended the land as an advancement. To rebut the implication of a trust, the defendant gave evidence of a variety of circumstances, consisting of declarations of *John Sampson*, acts of ownership by the defendant, and the common reputation of the country. To rebut this, the plaintiffs offered the deposition of *Robert Johnson* to prove he was present on the land when a contract for the sale of it was made between *John Sampson* and one *McWilliams*. The defendant excepted, but the evidence was admitted. I can see no objection to the admission of this evidence. Acts of ownership on the land, under the title now set up, and the declarations of *John Sampson* at the time, tending to explain those acts, were undoubtedly competent. But the deposition of *George McWilliams* was offered by the defendant and over-ruled. The witness, after stating that *John Sampson* had told him he had taken out the warrant, in the name of his sons, proceeded to state, "that in all the different conversations with the said *John Sampson*, he *always understood John Sampson*, allowed the land in dispute to be the property of the said *Charles* and *James*." It is objected to the competency of this evidence, that the witness does not say positively he had, in fact, any conversation with *John Sampson* and that he does not state any declaration of *Sampson*, but merely that the witness *understood* he *allowed*, &c. Did the matter rest on the first ground, I would have no hesitation in saying the evidence was improperly rejected. The witness positively states one conversation on the subject; and the inference is as strong as a positive assertion, that he had more. He swears positively he *always understood* in the *different* conversations, &c. He could not have understood any thing from conversations that never took place. But the evidence was properly rejected for another reason. To say a witness understood something without stating from what he understood it, is merely to give the impression of the witness without laying the circumstances

1818. from which he received it before the jury, to enable them to judge whether he made a just inference. In strictness a witness is not permitted to say he thinks or persuades himself, or believes, or, except in particular cases, to give his opinion as to a fact. The circumstances on which he finds his belief are better evidence and ought to be disclosed, that the jury may draw the conclusion for themselves. If the witness formed his opinion from the declarations of *John Sampson*, he should have stated what they were, not indeed in the very words used if he could not recollect them, but at least in substance. He may have formed his opinion from ambiguous expressions understood in a sense different from that in which they were intended to be used, or from other sources equally deceptive, and before the result of his judgment is given in evidence it should appear he judged correctly. It would be attended with great danger if the law were otherwise.

*Pittsburgh.*  
*SAMPSON*  
*v.*  
*SAMPSON*  
*and others.*

An exception was taken to the charge, on the ground, that the consideration of both law and fact was taken from the jury. The main question was, whether *John Sampson* intended the warrant as a gift to his sons *Charles* and *James*, and this was expressly put to the jury as a question of fact. After recapitulating the evidence, the Judge informed the jury, that some parts of it, for peculiar reasons, were entitled to little or no weight, and concluded by saying, "the evidence on the part of the defendant appears to be very loose, too much so to entitle him to a verdict." If the Court assume the exclusive right of deciding on facts, it is error; but that assumption must appear clear, before I will believe it intended on the part of the Court, or acquiesced in by the jury. Here the question of fact was submitted to the jury; but it is said, the Court gave a binding direction as to the weight of the evidence. The rules for weighing evidence are for the Court; the result of the process for the jury; but the general principle is more easy than its application to particular cases. An opinion, however, decisively expressed on the weight of evidence, is not error; but I agree with the decision in *The Firemen Insurance v. Walden*, 12 *Johns.* 318, that it must be expressed as opinion, and not as a direction binding on the conscience of the jury. But I do not go so far as to say every charge should so clearly distinguish between the law and the fact, that the jury *cannot* misunder-

stand their rights, or mistake the opinion of the Judge on matter of fact, for his direction in matter of law. If the right be not taken away at least by implication, it is not to be presumed the jury will err on this ground; it is presumed they, at least, know they are called in to decide something, not merely to say whatever the Court may dictate, and it will be sufficient if they are left to know they may so decide. Jurors may err in consequence of the expression of an opinion on the facts, but it is an error, like many others they may commit, which the law will not intend they will fall into without cause. My position is, that the rights of the jury ought not to be considered as invaded when the Court barely expresses an opinion on facts, without at the same time expressly informing the jury, that they may and ought to judge for themselves. But on the other hand, nothing should appear in the charge from which they might reasonably infer they were precluded from considering the facts. Where a Judge lays down a principle unquestionably correct in the abstract, yet if it be stated in a manner likely to produce misapprehension of his meaning, or a misapplication of it to the facts, it is error. In this case, I cannot but think the jury considered themselves bound by the opinion of the Court, as a direction as to the *legal effect* of the evidence. To say the evidence is too loose to entitle the party to a verdict, looks so much like a positive direction operating on both fact and law, that it may very well, to say the least, have been mistaken for one. I should be the last to restrain a free expression of the opinion of the Court as to facts, but it would be a safe course to inform the jury, at the same time, that they must ultimately judge for themselves. The judgment must be reversed.

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and others.

DUNCAN J. The merits of this case rest on one single fact. Was the warrant in the names of *Charles* and *James Sampson*, admitted to be taken out and paid for by *John Sampson* the father, taken out in trust for the father, or as an advancement to the sons?

A trust results by operation of law to him who pays the consideration money; yet in general a father taking a conveyance in the name of his child unprovided for, it is held an advancement. It is a *prima facie* evidence of advancement, and casts the proof on the father alleging the trust. But the

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contrary rule prevails as to applications taken out in the son's name or warrants, paid for by the father; for then it is to be presumed to the use of the father, and in that case it is incumbent on the son to rebut the presumption. 2 Sm. L. 171, 172. *Coxe's lessee v. Grant*, and *Fogler's lessee v. Gobach*. But this being but a presumption, may be repelled by circumstances and declarations of the father; the legal title is in the warrantee, but a presumption is raised. Circumstances inconsistent with such presumption will destroy it. The legal presumption is, that if a person actually takes out an application or warrant, and pays for it, it is a trust; that he used the name of the party; and this holds fully as strong in the case of a child as of a stranger.

A bill of exceptions was taken to the admission of the deposition of *George M'Williams*. It is confined to that part of it wherein he states, that in all the different conversations with the said *John Sampson*, he always understood that he, the said *John Sampson*, allowed the land now in dispute to be the property of *Charles* and *James Sampson*. The word allow, is used in the country not in a grammatical sense; sometimes, as know; frequently, as acknowledge. I take the word allowed here to be used in that sense; it will then read, in the different conversations I had with *John Sampson*, I always understood that the said *John Sampson* acknowledged the land in dispute to be the property of *Charles* and *James Sampson*. This is preceded by a declaration by the deponent, that *John Sampson* had told him that he had taken out a warrant for this land in the name of *Charles* and *James*. In 1 Johns. 95, *Stell and others v. J. Moses and sons*, a witness was called to prove a conversation between him and one of the defendants, in relation to the goods in question, and declared, that he could not recollect the expressions used, but would give his impression as to the substance of the conversation; this was objected to but received, and on motion to set aside the non-suit on this ground, among others, it was determined, that such evidence was inadmissible. I understood from the conversation I had with him, is certainly a strange mode of expression; the impression of the substance of a conversation. If depositions taken in the country were thus strictly scanned, how many of them must be rejected. Usage decides on the force of language. There was, therefore, error in rejecting that part of the deposition. But a question of the

most serious importance arises from the concluding sentence of the charge of the Court. "On the whole, the evidence on the part of the defendant appears to be very loose; too much so to entitle him to a verdict." This is complained of on the part of the plaintiff in error, as a decision of the facts by the Court, without submitting the testimony to the jury; the taking of the facts from the jury, whose province it was to decide on them. Error in statement of facts by a Judge, is not the subject of revision in this Court. The only redress is by application for a new trial; if this is refused the party is without a remedy. 2 Binn. 80. *Burd v. Dansdale*. So an opinion not warranted by the facts. But that is totally different from withdrawing the facts from the cognisance of the jury. The only way in which a cause can be withdrawn from the jury is by demurrer to evidence; a hazardous matter in parol testimony, where the party not only admits the facts, but every possible rational inference a jury might draw from the facts; every conclusion which the evidence offered conduced to prove. The fact here attempted to be proved by the defendant was, barely to rebut the presumption, that the warrant taken out in his sons' name was in trust for the father. The father's declarations, that he intended the lands for the sons, that it was their property, conduced to prove that fact. A Court on demurrer to evidence must then have decided on this fact as admitted, and if admitted there was an end of the controversy; the Court drew the conclusion of the law from the facts thus admitted; the whole evidence is insufficient to entitle the defendant to a verdict; admit all that his witnesses have sworn to be true, admit the conclusion to be drawn from their testimony, still it is insufficient. On the good old rule, as it is emphatically called by Chief Justice JAY, *Georgia v. Brailsford and others*, 3 Dall. 4, that on questions of law, it is the province of the Court, on questions of fact, the province of the jury, to decide; on this reasonable distribution of jurisdiction, rests all the super-eminent excellence of the boasted trial by jury. It was not an opinion on an abstract question of law, but a decision by the Court on the sufficiency of testimony to prove relevant facts. This evidence was in my mind sufficient for the jury, to have rebutted the presumption of resulting trust. It was not indeed conclusive evidence; it might not have satisfied the jury, but as it was matter for their consideration, they ought

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to have had an opportunity to weigh it. The charge was calculated to make the jury understand that the evidence offered was wholly insufficient, being too loose to entitle the defendant to a verdict; this was undertaking to judge for the jury, and amounted to a declaration to them, that any consideration of the evidence was wholly unnecessary; and therefore there was error in point of law in the charge of the Court. It was a declaration, that whatever credit might be given to the witnesses on the part of the defendant; whatever conclusion the jury might draw from the testimony, still it was insufficient in law to entitle the defendant to a verdict. I refer generally to *Alwyn v. Ulmer*, 12 Mass. 22, and 12 Johns. 518. *The Firemen Insurance Company v. Walden*, and to *Wright v. Small*, determined in this Court, September, 1808. Whether the evidence be rejected, or the jury be informed by the Court, it is of no avail, it amounts in effect to the same thing with the jury.

The Court further said, there was little or no weight in the declarations of the father, as they were not made in the presence of *Charles*. I cannot comprehend why this should diminish the weight of the evidence. If the father had by that declaration asserted a trust, not in the presence of *Charles*, certainly the Court would have been right; but when it was an admission against himself and his title, it did not require the presence of *Charles* to add weight to it, nor did his absence diminish the weight to which it was entitled; and I cannot consider our systems of jurisprudence to be so deficient, as that if a Court state that evidence was of little or no weight, and the reason why it is of little or no weight is assigned by them, on a misconstruction of the law of evidence, it does not subject their opinion so delivered to revision, and if it is found erroneous to reversal. The Court should have left it to the jury to decide, whether the evidence given by the defendant, was sufficient to rebut the presumption of the warrant being taken out by the father in trust for himself, for it is the peculiar and exclusive province of a jury to infer facts from the evidence; instead of which they pronounce on its sufficiency, and direct the jury that it is too loose to entitle the defendant to a verdict.

Judgment reversed, and a *venire facias*  
*de novo* awarded.

1818.

Pittsburgh.SIMPSON *against* HALL.

IN ERROR.

Wednesday,  
September 9.

EJECTMENT in the Court of Common Pleas of *Where the question was, for which of two persons bearing the same name, a warrant was designed, the Court held, that a party might, to shew for whom it was intended, give in evidence, his own acts and declarations, down to the period of its date.*  
*Armstrong County.*

*William Hall*, the plaintiff below, and *Andrew Simpson*, the defendant, both claimed the land in controversy, under the same warrant, which was taken out in the name of *Agnes Simpson*, on the 22d *November*, 1785, and on which a survey was made on the 30th *December*, of the same year. There were two persons of the name of *Agnes Simpson*, and the principal question before the jury, was, which of them was the warrantee. The plaintiff claimed as heir at law of his half sister *Agnes*, the daughter of *Andrew Simpson*, deceased, whose widow had intermarried with the plaintiff's father. *Andrew*, was the owner of a small improvement on the land, and was killed by the Indians, in the year 1776. After his death a warrant was taken out by his brother *James*, in the name of *Agnes Simpson*, to include *Andrew's* improvement. It was proved by the positive testimony of one witness, as well as by circumstances, that the person for whose benefit the warrant was procured was *Agnes*, the daughter of *Andrew*, then an infant, and that *Mary Wallace*, the sister, both of *Andrew* and *James*, had given certificates for money due from the state of Pennsylvania, to her late husband *Richard Wallace*, whose administratrix she was, by virtue of which the warrant was obtained. That the warrant was intended for *Agnes*, under whom the plaintiff claimed, was also inferred from the declarations of *James Simpson*, through whom the defendant derived his title. To the admission of these declarations in evidence, the counsel for the defendant objected; but the objection was overruled.

The defendant, who was the son of *James Simpson*, contended, that the warrant was designed for the benefit of *Ag-*

*ference to more remote kindred of the whole blood.*

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*SIMPSON*  
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*nes*, the daughter of *James*, who jointly with her husband, *Charles Gibson*, conveyed it by deed, dated, *May 16th, 1800*, to *James Simpson*, who subsequently conveyed it to the defendant. Some evidence was given to establish this fact, and it was proved, that *James* had paid *Mrs. Wallace*, the amount of the certificates she had previously given; but at what period the payment was made, or whether it was with his own money, or with that of his niece, did not appear.

On the part of the defendant the depositions of *James White* and *Hugh Martin*, were offered. *White* stated, that on the 15th *October, 1785*, *James Simpson*, the father of the defendant, applied to him to write three applications for warrants, which he did. One of them was in the name of *James Simpson*, another in the name of *Hannah Simpson*, and the third was in the name of *Agnes Simpson*, for land on the waters of *Kiskeminetas*, which he always understood to be that on which the defendant resided. He added, that he understood *James Simpson*, was making all the applications for his own use; that he accompanied him to *Hugh Martin*, esq. who gave such certificates as were then required to procure at the land office an exoneration of interest during the war; that the certificates were all paid for by him, and that he never heard of his having any claim to any other land near the *Kiskeminetas*, than this.

The deposition of *Hugh Martin*, stated, that on or about the 15th *October, 1785*, *James Simpson* applied to him for a certificate to be produced at the land office of *Pennsylvania*, for the purpose of having a tract of land, which had been located and surveyed in the name of *Agnes Simpson*, exonerated from the payment of eight years interest. The certificate was granted, and signed by himself and another justice of the peace of the county. There were certificates for two other tracts of land given at the same time to *James Simpson*, for the same purpose. On an objection being taken to the admission of these depositions in evidence, they were rejected by the Court.

The Court left it to the jury to determine whether the warrant was procured for the benefit of *Agnes*, the daughter of *Andrew*, or of *Agnes*, the daughter of *James Simpson*; instructing them at the same time, that if *James Simpson* paid

Mrs. *Wallace* the value of the certificates given by her, after the date of the warrant, and still more, if the payment was made for the purpose of vesting a title in himself to a warrant originally intended for the benefit of his niece, it was entitled to no weight. If, the Court said, the jury should be convinced that the warrant at the time of procuring it, was intended for the benefit of the plaintiff's half sister; the legal question would occur, whether she acquired the land designated in it by purchase, or by descent through her father. The first enquiry, in deciding this question, was, whether *Andrew Simpson*, her father had any, and if any, what interest in the land at the time of his death in 1776. It was certainly not a legal interest, and there having been no actual settlement of the premises previous to his decease, it could only be viewed as a very remote equity. He could not be said to have died seised, which supposes a complete title either legal or equitable. There was not even that kind of possession which the law respected. Though by courtesy among the first settlers, mere improvements were regarded, where they were not abused for the purpose of engrossing land, and were followed up within a reasonable time, yet they conferred no right, in law or equity, unless they were recognised by the proprietary. The only difficulty in the case, arose from the warrant calling for the land in dispute, as having been first improved in *March, 1774*. By an act of assembly, every application for land in the old purchase must designate the land applied for, and if improved, an affidavit of the time when it was improved, was requisite. A compliance with this law, could not, however, enlarge or diminish the quality of the estate. It might bind the applicant, if of full age at the time, in case of a contest between him and another applicant who might have procured an office right for the same land, but could have no other legal operation. They were therefore of opinion, that the title to the land in dispute, did not come to *Agnes*, the daughter of *Andrew Simpson*, on the part of her father. The only title which they could legally recognise, was that of the warrant and survey, which must be considered as a purchase on her part, descending to her general heirs, and by our law to her brother of the half blood, in preference to more remote kindred of the whole blood.

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On this opinion the Court, at the request of the defend-

1818. ant's counsel, sealed a bill of exceptions, and the record was  
Pittsburgh. removed by writ of error to this Court.

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TILGHMAN C. J. not having been present at the argument, gave no opinion.

GIBSON J. The depositions of *Hugh Martin*, and *James White*, were properly rejected. The ostensible object of the defendant, was, to shew acts done by *James Simpson*, in prosecution of the title; and these, provided the best evidence of them were offered, would unquestionably be competent. The best evidence would have been, the application itself, filed in the land office, or a certified copy, and also the original, or a certified copy of the certificate, to exonerate from the payment of interest. It was necessary to prove the contents of these papers, before the nature of the acts done could be ascertained, which could not be done by parol. But the papers being exhibited, the defendant might have given in evidence, the acts and declarations of *Simpson*, at the time, to explain his object and meaning. On the other hand, the depositions of *John Gibson* and others, excepted to by the defendants, were properly admitted, for they went to prove the declarations of *Simpson*, and were evidence against those claiming under him.

At the trial, it was material to ascertain, whether the warrant under which both parties derive title, was taken out for *Agnes*, the daughter of *Andrew Simpson*, from whom the plaintiff claims, as brother of the half blood; or for *Agnes*, the daughter of *James Simpson*, from whom the defendant claims by purchase. *Andrew Simpson*, was the owner of a small improvement on the land in dispute, which, it is acknowledged, did not vest a spark of title in him. After his death, this warrant was taken out by his brother, *James Simpson*, in the name of *Agnes Simpson*. It seems, the purchase money was advanced by *Mary Wallace*, the sister of *Andrew* and *James*. It was contended, this advancement was made in behalf of *Agnes*, the daughter of *Andrew*, on account of a horse, left by her mother in possession of the husband of *Mrs. Wallace*, for the price of which she supposed his estate was liable. It was proved by the evidence of *Mrs. Wallace*, (now *Mrs. Barr*,) that *James Simpson* reimbursed her the money so advanced; but, without stating when, or

whether it was on behalf of his daughter, or his niece. On this part of the case, the Court gave in charge to the jury, that if this payment was made after the date of the warrant, and much more, if it was made for the purpose of creating a title in himself, to a warrant originally intended for the exclusive benefit of his niece, it was entitled to no weight. Now to test the correctness of this opinion, it is only necessary to observe, that the title vested in somebody at the date of the warrant; and, if in the daughter of *Andrew*, no act afterwards done by *James Simpson*, could divest it; and his acts, not done in prosecution of the vesting of the title, could have no operation in his favour. But though these acts could not have that operation, it is said they ought to have had weight in rebutting the presumption that the advancement was made by *Mrs. Wallace*, in favour of the daughter of *Andrew*, on account of her claim for the horse, and to shew, that in fact the title never had vested in her. But this is the same in principle; a party may give in evidence, his own acts done at the time; but separate acts done afterwards, can have no operation in his favour. Here the question was, for whom did *James Simpson*, take out the warrant? Down to its date, his acts and declarations were proper to shew for whom he intended it; but acts done at a period to which the question does not relate, could have no effect. If the rule were otherwise, a party might make what evidence he pleased in his own favour. At the period of the payment to *Mrs. Wallace*, *James Simpson* may, for the first time, have entertained the design of making the land his own, by setting up his daughter as being the original warrantee, and a trustee for his use; and a payment obviously made to favour that design, if after the date of the warrant, could not be urged by him or any one claiming under him.

But a much more important question arises under the intestate act of 1794. By the 11th section it is enacted, that where any person shall die seised, leaving no children, &c. of the *whole* blood, then brothers and sisters of the *half* blood shall inherit in preference to more remote kindred, "unless where such inheritance came to said person so seised, by *descent, devise, or gift*, of some one of his or her *ancestors*, in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance." If therefore, *Agnes*, the daughter of *Andrew*, took the land by descent

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1818. from her father, the defendant as heir at law *ex parte pater-*  
*Pittsburgh.* *na*, would be entitled. On the other hand, if she acquired  
the land by an original purchase, the plaintiff her half brother by the mother's side would be entitled. The facts are, that *Andrew Simpson*, who was killed by the Indians in 1776, was the owner of an improvement on the land in dispute. There was no settlement, nor does it appear, the improvement was made *animo residendi*; and it is not contended he had a title on which an ejectment could have been maintained; or that he had any vested interest which the law recognises. On the 22d of *November, 1785*, *James Simpson* took out a warrant for *Agnes Simpson*, to include this improvement. This reference to the improvement as the commencement of the title, must have arisen from abundant caution; but a party shall not be precluded from disclaiming to hold under an improvement, because, for fear of jeopardising his title, he chooses to pay interest to the state from the commencement of his improvement. Assuming then, that the warrant was intended for *Agnes*, the daughter of *Andrew*, the question will be, whether the land came to her by descent from her father, within the 11th section of the intestate act, or, by original purchase from the commonwealth. The clear object of this section, was to let in brothers and sisters of the half blood, and yet to prevent property coming from an ancestor, for which a valuable consideration was not paid by the heir or donee from passing out of the blood of such ancestor; and nothing could be more reasonable than that a transfer, made either by the act of the party, or the operation of law, and which was merely gratuitous, and in consideration of consanguinity, should continue no longer than the consideration lasted, and that, instead of going to strangers to the consideration, the property should revert to the blood of the ancestor from whom it moved. Where therefore the ancestor had the estate clear of incumbrances, there can be no difficulty. But it becomes almost impossible to fulfil the intention of the legislature, where the ancestor had not the whole property in the thing; as where land was articulated to be purchased, and none, or but a part of the purchase money was paid by the ancestor; or where incumbrances to the full amount of the value had been discharged by the heir, with funds acquired by his own industry; this, in substance and effect, would be a new purchase. But although in such

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case the reason would not hold, I am not prepared to say the estate would not be considered as having come on the part of such ancestor. It is however, not the case before us. But a stronger case would be, that of land incumbered by an ancestor, say a *father*, and the incumbrance paid off with funds derived from the *mother*; here, though the property ostensibly would have come on the part of the father, yet it would have substantially come on the part of the mother. On the other hand, where land is purchased with money derived from an ancestor, the land will not, for that reason, be considered as having come on the part of such ancestor; for though in equity money of an infant laid out in land, is still to be considered as money, yet the reason of that is, because of the different ages at which an infant may dispose of real and personal estate, and not out of favour to any one representative more than another. *Peirson v. Shore*, 1 *Atk.* 480. For this reason, I apprehend that the circumstance of *Agnes*, while an infant, having purchased the warrant with funds derived from her father, cannot strengthen the defendant's case, and even if the land should be considered as money, it would not be within the provisions of this section, which relates to the realty only. I do not mean to express an opinion on the cases I have put; they must arise before long, when it will be time enough to decide them; but I mention them to shew how difficult it is to lay down any general rule, that will, in all cases, completely effect the object of the legislature; and to shew the danger of carrying the construction beyond the letter to provide for an apparent equity, or to obviate the hardship of a case. Establish what rule we may, its operation will produce hardship in some instances, and thwart the intention of the legislature. What rule of construction can effect it, where the land has been paid for in part by the ancestor, and in part by the heir out of his own funds? The half blood must take all or none. I have no doubt the motive that actuated *James Simpson*, in taking out this warrant in the name of *Agnes*, was her being the daughter and heiress of his brother *Andrew*, and that he considered her as having a claim, at least in point of conscience, on the score of her father's improvement, and that had he supposed the land on her death would have gone out of the family, he would have acted differently. But would not a gift of land made by him for the same consideration be a new

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purchase, the ancestor of the donee having had no interest? Certainly consanguinity to a particular person, being the meritorious cause of a gift, will not be equivalent to a derivation of the estate from such person, although it is reasonable, that a stranger to the consideration should not enjoy a beneficial interest under the gift; and yet, in such case, a stranger might take. Such, in effect, is the case here; except that this is stronger than a gift from *James Simpson*; for only his trouble in managing the business was gratuitous, the purchase money being paid by the warrantee with her own funds. It is going far enough towards effectuating the intention of the legislature, to say the ancestor must have had some vested interest in the land, equitable or legal, not resting for its continuance on the good will of the owner of the fee, but one which the law will acknowledge and protect. Cases of leases bear some analogy. In *England*, the right of renewal, as it is improperly called, cannot be insisted on in a court of law, or equity, there being no obligation on the part of the landlord to renew, but the constant habit of re-granting the land to the same person, at the expiration of the lease, has created a kind of ideal interest beyond its termination, which men have considered as if it were real. Hence where a trustee, guardian, or executor, availing himself of his situation, gets a renewal of a lease for his own benefit, equity will make him a trustee for the person beneficially-interested in the old lease, 4 *Wils. Bac. Ab.* 221. But this is done, not on the ground of some spark of equity, or ideal right, in such person, predicated on, and connected with a preceding interest, but on the ground of public policy, which forbids a trustee, guardian, or executor, to derive any benefit for himself; the *cestui qui trust*, or ward, being entitled to all the benefit resulting from his acts. But the case of *Peirson v. Shore*, 1 *Atk.* 480, is, in principle, exactly our case. A, who had a bishop's lease to her and her heirs for three lives, devised the same to her infant daughter, and directed the guardian and trustees, to make purchases for the infant's benefit. On the decease of one of the three lives, the guardian took a new lease for three lives; the infant died; and it was held by the Chancellor, that this being a descendible freehold, if nothing had been altered, it would have gone to the heirs on the part of the mother. But the new lease was to be considered as a new acquisition by purchase, just as if the infant had lived

to full age, and had then surrendered the old lease, and had taken a new one; or as if all the lives had fallen in and the guardian had renewed the lease; in all which cases, it would have been considered a new purchase, and would have gone to the heirs, *ex parte paterna*. In *Mason v. Day, Prec. in Chan.* 319. 1 *Ask.* 481. there is the same point. A *feme* purchases a church lease to her, and her heirs, for three lives, and dies, leaving an infant daughter; two of the lives die; the infant's guardian renews the lease; this is a new purchase and shall go to the heirs on the part of the father. The rule is, that a guardian or trustee may change the nature of an infant's estate, under particular circumstances, as where it is manifestly for the benefit and convenience of the infant; or, whenever a Court of Chancery would do it. *Inwood v. Twine, Amb.* 419. Viewing *James Simpson*, in the light of a guardian, it is evident the purchase was for the benefit of *Agnes*, for without it, the land would have been lost for ever. In fine, I do not see how it is possible an estate can descend or come by devise or gift from an ancestor who had no title to it, equitable or legal, which would be recognised in a court of justice. It may be, where the title is in the ancestor, and the land comes to the heir incumbered, or charged to the amount of its full value, that the discharging it out of funds coming by another ancestor, or acquired by the heir himself, shall not be considered as a new purchase for a valuable consideration; and even this is a hard case and going beyond the object intended to be secured by the legislature, but perhaps inevitably arising from the necessity of having a rule adapted to all cases. But I would not go further, and say where the ancestor had neither title nor beneficiary interest, he should nevertheless be considered as having transmitted the estate to his descendant. I am of opinion, the judgment ought to be affirmed.

DUNCAN J. The fact which *Agnes* was intended by the warrant, was properly submitted to the jury. The question, whether, if the jury should find that *Agnes*, the daughter of *Andrew*, and not *Agnes*, the daughter of *James*, was the person in whose name, and for whose use the warrant was taken out, she took the estate *ex parte paterna*, or as a new purchase or acquisition, was a question of law, and as such, was properly decided by the Court.

The father, *Andrew*, did not die seised; he neither had the legal estate, nor a right in equity to call for it; he had

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neither *ius in rem*, nor *ad rem*. It was at best but a bare curtesy, but it was such a curtesy, as is entitled to some respect; and if *James* had taken out the warrant in his own name, with the money of *Agnes*, the daughter of *Andrew*, and dated it back to the improvement of *Andrew*, I should be disposed in that case, to consider him a trustee for her; acting as her guardian; and to support this, I think there are both reason and authority. 4 *Bac. (Wils. edit.)* 222. (*Of the renewal of leases, by whom, and for whose benefit.*) In treating of leases by a church, or other corporation, it is said, it has happened in those cases, as in many others, that long indulgence, has been made a ground of claim; a preference repeatedly given, has been insisted upon in process of time, as a prescriptive right, and attempts have been made to enforce that as a right, which was in truth, a pure voluntary curtesy. But though such attempts have failed of success, there being as between landlord and tenant, abstractedly from any express contract to that effect, no obligation on the former to renew with the latter, yet the almost invariable recurrency of the grant to the same object has begotten an idea of something like property, and men have been so far from treating this ulterior interest as precarious, that they have acted upon it as if it were fixed and certain. The tenant's right as it is called is recognised and protected by Courts of Equity in many instances. Hence, when a trustee, executor, or guardian, avails himself of his situation, and gets a renewal of a lease for his own benefit, the Court will direct it to be for the use of the *cestui qui trust*. For some time I hesitated whether in conformity to this principle, *James*, acting on behalf of *Agnes*, *Andrew's* daughter, an infant, and making her father's improvement the foundation of the purchase from the state, it would not enure to her, not as a new acquisition, but in contemplation of equity, as an estate coming to her on the part of the father; it not being in the power of any one acting on behalf of an infant, by his own act, to alter the nature of the succession. But tracing up the doctrine on this subject to its source, it will be found, that this is not universally the case; for where the act has been for the benefit of the infant, in many cases Courts of Chancery will consider it as if done by the infant, and as if done by him when of full age, and when he had capacity to act. But it must not be a capricious alteration of the estate, it must be an act done for the benefit of the infant, and not solely with a view to alter the succession; for then it would

be a fraud on the heirs, representatives of the infant, and be void. Now no act could be more beneficial to *Agnes*, than this act of the uncle, in taking out the warrant for her. If he had not done so, the land would have been lost to her, and to her heirs, and to the heirs claiming it as an estate descending on the part of her father. No injury was done to them, for they had nothing to lose. No succession was changed, for there was no estate to which they could succeed. On this principle, many cases have been decided. A bare trustee cannot alter the nature of the trust, so as to make it vest in different persons, by his act, than it otherwise would have done, *Furlam v. Sanders*, 7 *Bac. (Wils. edit.)* 153. *Witter v. Witter*, 3 *P. Wms.* 99. But however in general true this may be, yet the succession may be even changed, where the act is manifestly for the infant's benefit at the time. *Rooh v. Warth*, 1 *Ves.* 461. *Tullet v. Tullet*, *Ambl.* 370. *Inwood v. Twyne*, *Id.* 417. *Mason v. Day*, *Pre. in Ch.* 319. Where a *feme* purchased a church lease, to her and her heirs, for three lives, and died, leaving an infant daughter; two of the lives died, and the guardian renewed the lease; it was holden, that this renewed lease was a new acquisition, and should go on the part of the father. So in *Pierson v. Shore*. 1 *Atk.* 480. *A*, who had a bishop's lease, to her, and to her heirs, during three lives; devises the same to her daughter, an infant, and directs the guardians or trustees, to make purchases for the infant's benefit. The guardians, on the decease of one of the three lives, took a new lease for three lives; the infant died. The lease shall go to the heirs of the infant *ex parte paterna*, for this is a new acquisition. In that case, it was objected, that this was an act, done by a guardian only during the minority, and ought not to prejudice any who take by representation, it being an act merely voluntary, and not of necessity. How much stronger then this case, where there was no subsisting interest in the infant, and where the act was of absolute necessity. But the Court say, here one life being dead; surrendering the old, and taking a new lease, was the most beneficial purchase for the infant that could be, and therefore ought to have the same consequences as if done by the infant herself, at full age, and go to the heirs, *ex parte paterna*. This then is to be considered as an estate which *Agnes* takes as a purchaser, and not by descent from her father, and consequently goes to her own heirs.

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Judgment affirmed.

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IN ERROR.

After a warrantee has had a survey made and marked upon the ground, he has fully exercised his rights as to the land to be appropriated, and the customary permission to locate his grant again, can never be allowed to the prejudice of third persons. If therefore a warrantee, after having made a survey on the ground on a descriptive warrant, protract the lines of the survey on paper, so as to include land which was not embraced by the lines marked upon the ground, his title to the land thus taken in relates only to the return of survey, because it is founded on a new contract, to which the assent of the Commonwealth is not given until that time; and if a title be previously acquired under the Commonwealth by one who had no notice of the protraction of the lines of the first survey, it will not be affected by it.

FROM the bill of exceptions which was returned with the record of this ejectment from the Court of Common Pleas of *Indiana* county, it appeared, that the plaintiff below, the defendant in error, claimed the land in question under a patent to *William Browne* and *James Harris*, dated *September 21st, 1789*, which recited a warrant to one *Houston*, and *mesne* conveyances from him through several persons to the patentees. The title of *Browne* and *Harris* was regularly conveyed by deed, bearing date *August 12th, 1795*, to the plaintiff.

The defendants, who admitted that they were in possession of the land within the lines described by the patent, founded their title on a warrant, dated *July 23d, 1773*, to *Adam Holliday*, for 300 acres of land on a run emptying into *Clearfield* creek, including the upper beaver dam, and his improvement in the county of *Bedford*. On this warrant a survey was made of 306 acres 129 perches by *Thomas Smith*, esq. deputy surveyor, who was paid his fees on the ground, and who, on the *17th September, 1773*, signed a receipt for his fees for making and returning the survey; but the survey was not returned until a long time afterwards, for reasons which will be hereafter stated. A patent issued to *Holliday* on *17th March, 1796*, and it was admitted, that his interest was regularly vested in the defendants.

It was proved by a witness who directed the survey as the agent of *Holliday*, and assisted in carrying the chain, that he was instructed by his principal to take in the land in question on account of the timber, and that after they had run some distance on the second or third course, excluding the land in

the hands of the deputy surveyor, is no notice that the protraction on paper is different from the lines marked upon the ground. Recitals of *mesne* conveyances in a patent of an earlier date than the return of a survey which has been protracted on paper, are evidence to shew, that the interest of the warrantee is vested in the patentee.

controversy, he directed Mr. *Smith* to go back and continue the first course, with a view to take it in. Mr. *Smith* declined doing so, but said he would run down until he came opposite to the line of the first course, which he would extend and take the land in as well in that way as if the line were run upon the ground, and would plot it in and make return of it. He had his protracting instruments with him, and the witness saw him make out his field notes that night, according to the manner in which he had stated he would make the survey. The warrant was in Mr. *Smith's* hands at the time the survey was made, and was located according to the description contained in it. In the spring of 1773, *Holliday* had a cabin raised, and apple trees planted on the tract, and there were when the witness saw it, about five or six years before the trial, twenty or thirty acres cleared, on that part of it which was occupied by *Diggs*, one of the defendants. Ten or fifteen acres were cleared on another part of the tract, and snug houses built upon it. More than twenty years prior to the trial *Holliday* sent for his patent, and finding that the survey was not returned, he called upon Judge SMITH, (formerly the deputy surveyor,) to inquire why it had been delayed. The reason given was, that the fees had not been paid. On the production of his receipt, Judge SMITH directed Col. *Cannon* to make the return, and the return was made on the 6th April, 1796. Whether the improvements on that part of the land which lay within the interference were made by the plaintiff or the defendants, did not appear.

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In delivering his charge to the jury, Judge YOUNG declared, that notwithstanding the specialty of *Holliday's* warrant, if no survey had been made in pursuance of it, until after the date of the plaintiff's patent, the warrant would be of no avail. In regard to surveys made but not returned, through the fault of the deputy surveyor, he stated the rule to be, that the owner of the warrant was not to be prejudiced except in cases of shifted warrants; but that this, like every other general rule, was not to be taken absolutely. He inclined to the opinion, that a purchaser for a full consideration of patented land, without notice of a prior survey which had not been returned, ought to be protected against the negligence of the officer. But if the law were not clear on this point, he was of opinion, that the rule could not be extended

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to land not embraced by the lines of the survey at the time of making it on the ground. The actual lines on the ground constituted the survey. These lines might, without doubt, be extended by protraction, without actual measurement, but unless a return of the survey so protracted had been made before the land excluded by the original survey were appropriated by another, the general rule already stated, did not apply. The protraction beyond the original lines, without a return of the whole into the surveyor general's office, could not operate as notice to others. In that case, express notice to the party, claiming under a later warrant and survey, would be requisite, and such notice would be still more necessary to affect a purchaser under a patent. If, he concluded, the principle laid down be correct, it was not incumbent on the plaintiff to shew the *mesne* conveyances from *Houston*, the warrantee to him, the recitals in the patent being sufficient evidence of them.

To this opinion, the counsel for the defendants excepted, and the questions arising out of it were argued in this Court, by *Kelly*, for the plaintiffs in error, and *Smith*, for the defendant in error.

The opinion of the Court was delivered by

GIBSON J. It is a general rule, that the owner of a warrant shall not be prejudiced by the neglect of the deputy surveyor in not returning the survey; but it is subject to exceptions. A survey made on a shifted location or warrant vests no interest in the land, before it is in fact returned into office; for a purchaser, without notice of the prior survey, appropriating the same land, will hold it, notwithstanding the return was delayed by the negligence of the officer. The chief reason of the difference between a survey on an indescriptive and on a shifted location or warrant, seems to be this: in the case of the former, the marks on the ground will put a party on inquiry, in prosecuting which he will find nothing to give rise to a belief, that the survey on the ground was not made on the indescriptive warrant or without authority; and therefore the interest shall attach from the date of the survey. But in the case of a *shifted* right, all inquiry will prove fruitless before the return of survey, as it would terminate without discovering any office right, that could by any possibility

be applied to the land, it being impossible in such a case to connect the description in the warrant with the survey on the ground; a settler or purchaser might, therefore, reasonably conclude such survey was made without authority. In the latter case, to prevent surprise on third persons, it behoves the owner to get his survey returned as soon as possible, for an adverse survey made before the return, and without actual notice of the prior survey, will prevail. These principles have some bearing on the case before us. The defendants below claimed under a descriptive warrant, on which a survey was made the 13th *September*, 1773, the lines of which as *actually run* and marked on the ground, exclude the land in dispute, but at the same time the survey was made, or immediately afterwards, it was included by protraction of the lines on paper. Mr. *Smith*, the deputy surveyor, was paid his fees at the same time, but the survey was not returned before the 6th *April*, 1796. The plaintiff claims under a patent dated the 21st *September*, 1789, without notice having been brought home to him of the extension of the defendant's lines by protraction. Can his title, accruing before the return of defendant's survey, be affected by an alteration made on paper, of which he could not be apprised? If *Holliday*, the warrantee, was dissatisfied with the lines run, he had a right to require the surveyor to go again on the ground, and by actually running and marking new lines, and obliterating the old ones departed from, to correct whatever had been done amiss. This having been omitted, the land excluded by the lines on the ground remained open to other purchasers without notice, who might appropriate it at any time before the return of survey. But it is contended, this survey while in the hands of the deputy surveyor was notice. I can see no reason for that; because the survey appearing from the marks on the grounds to have been complete, and to have excluded the land in dispute, there was nothing to create a suspicion, that the protraction on paper was different, or that could serve to put a subsequent purchaser on inquiry.

It is further objected, that the Court instructed the jury, that the recitals in the plaintiff's patent of certain intermediate conveyances from *Houston*, the original warrantee, to the patentee, were evidence of those conveyances. The abstract rule on the subject is clearly laid down in *Bonnet v. Devebaugh*, and the other cases in *Binney's Reports*. A

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*Pittsburgh.* or and all claiming under him, by a transfer of his interest  
 subsequently made. In *Penrose v. Griffiths*, the reason of  
 the rule is rightly given by the Chief Justice; a recital  
 amounts to a *confession* of the grantor, and therefore affects  
 him and all who claim under him, and stand in his stead.  
 The question then is, whether the defendants derive their  
 title, such as it is, from the date of their warrant or from the  
 return of their survey. I apprehend they can claim by title,  
*as to the land in dispute*, only from the return of survey. A  
 grant by the state of a portion of her land, then not measured  
 off from the common stock, must necessarily be uncertain as  
 to the identity of the very land granted, unless it be describ-  
 ed by natural boundaries as in case of an island. A descrip-  
 tion in a warrant may designate the spot where the location  
 is to be made; still, however, a survey is necessary to define  
 specifically, the exclusive boundaries of the object of the  
 contract. The grantee has the right of directing the appli-  
 cation of the warrant to suit himself, and having thus desig-  
 nated his boundary, the object of the grant is as definitely as-  
 certained as if its boundaries had been originally fixed by the  
 terms of the contract, and the interest vests from the date.  
 When a warrantee has bounded his pretensions by lines run  
 and marked, he has fully exercised his right as to the land to  
 be appropriated; and having done so, the state might with  
 strict justice hold him to his choice; for the customary per-  
 mission to locate his grant over again before return of survey  
 was at first a matter of indulgence, not of right; and is still  
 never allowed where third persons are concerned. Now  
*Holliday*, the warrantee, executed the contract with the state  
 in making a survey which excluded this land; and it then  
 ceased to be the subject of contract between him and the state  
 if it had been so before. If then the defendants derive title  
 from the state, it must be on the ground of a *new contract*,  
 different from that which was executed by the warrantee, and  
 which must relate to the return of survey, because the assent  
 of the Commonwealth is not given before that time. But if  
 a warrantee has, under the custom of the land office, a right  
 to re-locate his grant, independent of the assent of the Com-  
 monwealth, he can only do so where he does not interfere  
 with intervening rights; and here was an intervening right  
 attaching itself to the land at a time when it might well do

so. No right can vest under *Holliday's* warrant, without excluding *Houston's* survey. The appropriation of the land in question, by protraction, could have no validity till ratified by the state; while the land remained her property and subject to her disposal, that ratification might be made on what terms she pleased, and the point of time at which the title should commence would be a matter between her and the grantee. But I deny, that the state, having granted this land to *Houston*, at a time when she was the absolute owner of it, could by any after act vest even colour of title in a third person, to commence for any purpose or in any point of view prior to such grant. The original contract between *Houston* and the state, looked to an appropriation by a survey in the usual manner; but it was not executed by the grantee; for no such appropriation of the land in dispute was ever made. The acceptance of an appropriation of a different sort by a protraction on paper, was a new contract, which could not have a retrospective operation against a prior grantee. I therefore think the defendants derive no title under *Holliday's* warrant, for that warrant was never executed on the land in dispute; but their title from the state, such as it is, (and even a patent could give but colour of title,) must take date from the return of their survey. This being the case, and the patent under which the plaintiffs claim being earlier than the return, its recitals were evidence to shew, that the interest of *Houston* was vested in the patentees.

A defendant cannot use the recitals in a plaintiff's patent, to shew an outstanding title in a third person; for those recitals being in the nature of a confession must, if they are used at all, be all taken together. The defendant will not be permitted to select such parts as operate in his favour, and reject the rest. If he will shew title in a third person by the recitals of a patent, he makes all the recitals it contains evidence as well against him as for him; he can only avoid their operation by not having recourse to them, but producing the original title papers of such outstanding title. I am of opinion, the judgment ought to be affirmed.

Judgment affirmed.

1816.

Pittsburgh.PIPER and another *against* SINGER.

IN ERROR.

*September.*

The burgesses, &c. of the borough of Greensburg, in the county of Westmoreland, have no authority to assess and levy a tax on the public property belonging to the county, situate within the limits of the borough.

It seems, that the property of counties, is not taxable, for city, or borough purposes.

WRIT of error to the Court of Common Pleas of Westmoreland county, in a suit brought by *Simon Singer*, collector of the borough of *Greensburg*, in the county of Westmoreland, against *Robert Piper and others*, commissioners of the county, to recover certain taxes which had been assessed on the public buildings belonging to the county, situate within the borough.

In the Court below, judgment was entered by agreement, in favour of the plaintiff, for the purpose of taking a writ of error, without prejudice, and having the cause examined and determined by the Supreme Court, upon a statement of facts which accompanied the record, and which was substantially, as follows :

In the month of *May*, 1815, the burgesses of the borough of *Greensburg*, directed that a tax should be assessed and levied within the said borough, for the purposes indicated in their act of incorporation. The sum of one hundred dollars, was assessed upon the public property belonging to the county of *Westmoreland*, situate within the borough: viz. the court house, jail, &c. as the proportion of the tax for that year, which should be paid by the county, for, and on account of the said property. This was the fair and proper proportion of the tax, according to an impartial and legal valuation of the property. The county commissioners refused to pay it, alleging that the property of the public, within the bounds of an incorporated borough, was not subject to taxation for borough purposes.

The question was argued by *Reed*, for the plaintiffs in error, and by *Alexander*, for the defendant in error.

The opinion of the Court was delivered by

TILGHMAN C. J. The question in this case is, whether the burgesses and assistants of the borough of *Greensburg* had

a right to assess and levy a tax on the court house, and other public property, belonging to the county of *Westmoreland*, *Pittsburgh*, and situate within the limits of the said borough. 1818.

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The town of *Greensburg*, in the county of *Westmoreland*, was erected into a borough, by act of assembly, on the 9th Feb. 1799. (5. Car. and Bi. L. 362.) By the 4th sect. of the act, the burgesses and assistants are authorised, "to make such ordinances, rules, and regulations, as may be necessary for improving, and keeping in order, the streets, and alleys, within the said borough, and removing nuisances, or obstructions therefrom, and the same, to annul, alter, or make anew, as occasion may require, and also, to assess, levy, and collect a tax, for the said purposes," &c. And in laying the assessment, they are to be governed by the valuation of taxable property, taken from the last assessment. Now if this law is taken literally, it would be impossible to tax the property of the county, because, there never was any valuation of such property, in any former assessment. Then, if we consider the reasonableness of the thing, and the probable intent of the legislature, there is great cause for exempting the public property of the county, from borough taxes. Before the erection of the borough, two main roads through the town of *Greensburg*, were probably sufficient for the accommodation of the county; and these were kept in repair, at the expense of the county. But the inhabitants of the borough require a number of streets, and alleys, for their own particular accommodation, in which the inhabitants of the county in general, have no concern, and therefore, ought not to be taxed for keeping them in repair. The general understanding has been, that the property of counties was not taxable for city or borough purposes. I have made enquiry in the city of *Philadelphia*, and find, that the public buildings, &c. belonging to the county, have never been taxed. So that as far as long usage goes, the construction has been fixed. I am therefore of opinion, that the property of the county of *Westmoreland*, was not liable to taxation, and that the judgment should be reversed.

Judgment reversed.

1818.

Pittsburgh.**Hess and others against WERTS.**

IN ERROR.

September.

Promissory notes, in the nature of bank notes, issued by an unincorporated association, after the act of 21st March 1814, and prior to the act of 22d March 1817, are recoverable in a suit against the members of the association as partners.

Though such notes contain a promise, to pay "out of their joint funds, according to their articles of association," yet the members are personally liable.

**ERROR** to the Court of Common Pleas of *Fayette* county, in a suit brought by *Werts*, the plaintiff below, against *Hess and others*, in which the jury found a verdict for the plaintiff, for 6000 dollars, subject to the opinion of the Court below, on the facts of the case, stated as a special verdict. Judgment was entered below, for the plaintiff.

It was an action of *assumpsit* for money had and received, brought against *Hess and others*, as partners, under the name and firm of "The Farmers' and Mechanics' Bank of *Fayette* County, Pennsylvania," to recover the amount of certain promissory notes, made and issued by that association, between the 1st *January*, 1815, and the 22d *March*, 1817, in the following form:

"The Farmers' and Mechanics' Bank of *Fayette* county, *Pennsylvania*, promise to pay to *J. T.* or bearer, on demand, one dollar, out of their joint funds, according to their articles of association.

C. D. Cashier.

A. B. President."

These notes came to the hands of the plaintiff, in the usual course of trade, and for a valuable consideration, after the 22d *March*, 1817. Demand was made of the notes, on the cashier, at the office of the association, on 14th *June*, 1817, and he refused payment. The joint funds of the association, were insufficient to pay. The association was not incorporated. By the act of assembly of 21st *March*, 1814, sect. 13, "all orders and notes, in the manner or nature of bank notes, which shall be issued after the first day of *January* next, by any unlawful and unincorporated bank, and all orders and notes, payable to bearer or order, in the manner or nature of bank notes, which shall be issued after said day, by any individual, or corporation, not incorporated for banking pur-

poses, by this, or a special act of the general assembly for that purpose, *shall be absolutely null and void, and have no effect, either in law or equity, and irrecoverable in any Court within this Commonwealth*; and all notes taken by, and discounted, and all contracts relative to business usually done by banking companies, which shall be made by such unlawful, and unincorporated bank, individual, or corporation aforesaid, after said day, shall, in like manner, be absolutely null and void, and shall have no effect whatsoever, either in law or equity, and irrecoverable in any Court in this Commonwealth; and it shall moreover, be the duty of every judge, or justice of the peace, within this Commonwealth, to dismiss, with treble costs, any suit brought for the recovery of any money, or the fulfilment of any contract or engagement, as soon as the same is discovered to have a connection of any nature or kind, with any such unlawful or unincorporated bank, individual, or corporation aforesaid, so as aforesaid published." By the act of the 22d March, 1817, sect. 7, "so much of any act of assembly heretofore passed, as deprives or prevents the holder of any note, ticket, or engagement of credit, in the nature of a bank note, from recovering from any individual bank or corporation, association, or partnership, by whom, or by any of whose officers or agents, the same has been made, signed, or issued, by reason of such note having been made, signed, or issued, without, or in contradiction to law, be, and the same is hereby repealed; and the holder of every such note, shall have the same legal remedy, for the recovery of the amount thereof, from the party or parties, whether corporate association, or partnership, or individual, who made, signed, or issued the same, as can, by the provision of this act, or by the existing law of this Commonwealth, be had on a similar note, ticket, or engagement of credit, that has been lawfully issued."

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On the trial, the defendants objected to the promissory notes being given in evidence to the jury; but the Court admitted them, and sealed a bill of exceptions.

*Kennedy and Campbell*, for the plaintiffs in error.

1. The act of 21st March, 1814, declares these notes totally void, and irrecoverable in a court of justice. It destroys, not merely the notes themselves, but the whole con-

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tract on which they are founded. It was impossible for the legislature to have used more comprehensive language. Their object was, to prevent their currency, and that could only be effected, by taking away all legal remedy of what nature or kind soever. There was in truth, no contract, except that which arose upon the face of the note, and it was rendered void, when the note was. The act of 22d March, 1817, must be construed to refer only to cases arising after the date of that act. It will not be construed as retrospective, because if it were so considered, it would violate the constitution, which declares, that no *ex post facto* law shall be made. The legislature will not deprive men of their property and rights. As, before this act, there was no contract known to the law, the legislature cannot make a new contract for the parties. It is no argument to say, that the legislature only enforced a moral obligation. Suppose a debt barred by the statute of limitations; could the legislature revive it? Twenty-one year's possession gives a title to land; could that be affected by a new law? They cited *Dash v. Van Kleeck*.(a)

2. But secondly, the association engaged to pay, only "out of their joint funds," and to them, every person who dealt in these notes, must look for their redemption. The holder was aware at the time of taking the notes, of the nature of the security, and it is his own act, if it is inadequate. When the terms of a bargain are fully notified to the other party, he is considered in law, as agreeing to those terms, and bound by them. The association never stipulated for any thing more than their joint funds, according to the articles of association; and to them only the holder must look.

*Ewing and Lyon, contra.*

It is true, the act of 21st March, 1814, makes these notes void as a security, but such void security may still be evidence of a debt. The act avoids the security, not the contract. Policy may require, that the security, or written evidence of a contract, may be declared void, and yet the contract itself, may remain. As in the case of *Barjeau v. Walmsly*,(b) and afterwards on great deliberation, in *Robinson v. Bland*,(c) where it was held, that though the stat. 9 Ann. c. 14. makes all notes, bills, and other securities, given for money, lent at play, utterly void, frustrate, and of no effect, to

(a) 7 Johns. Rep. 508. (b) 2 Str. 1249. (c) 2 Burr. 1077.

all intents and purposes, yet the security only was void, not the contract; and that although no action could be maintained on the written instrument, given to secure the money loaned, yet *assumpsit* for money lent, could be maintained. But whatever difficulty may have existed, is effectually removed by the act of 22d March, 1817. If the remedy was suspended, till that act, it was then restored. It is not *ex post facto*, its object and operation were merely, to remove a legal prohibition. There existed, notwithstanding the act of 1814, a moral obligation on the part of this association, to pay their notes; and the act of 1817, does no more than furnish the means to enforce this moral obligation. Besides, these were negotiable notes; they were received *bona fide*, and for a valuable consideration, after the passage of the act of 1817. Every new transfer creates a new promise; of course, the promise to the plaintiff is to be considered as arising after that act.

2. The defendants are partners. No act of partners amongst themselves, shall prejudice a third person. Though they engage among themselves, that some only shall be liable, the law makes all liable. Here, the funds were in the hands of the drawers. The credit was given to them personally; the mention of the funds, is to declare their application among the partners themselves. 2 *Ld. Raym.* 1361. *Chitty on Bills*, 168. Their articles of association, are a secret agreement which cannot limit their responsibility. *Watson on Part. 2*, 3. 22. A promise to pay out of the funds of a ward, makes the drawer personally responsible. 2 *H. Black.* 235.

TILGHMAN C. J. gave no opinion, not having heard the argument.

GIBSON J. The defendants contend, that by the act of 1814, the contract was rendered *void*; and that it was not competent to the legislature to create, by its repeal, a new contract for the parties, which, in point of law, had no previous existence. It certainly never was in the view of the legislature to make a new contract, nor have they done so. The object of the act of 1814, was, among other things, to restrain the circulation of the notes of unlawful banking associations; and for this purpose, such notes are declared void. I think it quite immaterial, whether the notes are to

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be considered void, only as a security, or whether the contract also was intended to be avoided, so that no action could in any form, be sustained on it. It is most probable, the latter was intended; for if the holder could recover at all in an action on the contract, by using the notes as the evidence of a debt, his security would in reality be as great, after the passing of the act, as it was before. Certainly the legislature intended to do something more than change the form of action; which would have been doing nothing. I have always doubted the propriety of the decision, in *Robinson v. Bland*, & *Burr*. 1077, where this kind of distinction was first started.

There is no force also, in the argument, that the notes being payable to bearer, a new promise arose to the holder, on their being received by him, since the passing of the repealing act. This notion, which is an artificial one, is sustained, where it holds at all, for the sole purpose of giving the holder an action in his own name, without deriving title *through the preceding holders*, and would, if applied to this case, in reality create a new contract. In contemplation of law, a new promise arises to every subsequent holder of a note, payable to bearer, but such promise is not supposed to have been *made*, at the time the person became the holder, but at the time of making the note; and it is always so declared on. I will consider the case, therefore, on the broad ground of the contract having been void when made, and of no new contract having arisen, since the repealing act. But by rendering the contract void, it was not annihilated. The object of the act of 1814, was not to vest a right in any unlawful banking association, but directly the reverse. The motive was not to create a privilege, or shield them from the payment of their just debts, but to restrain them from violating the law by destroying the credit of their paper, and punishing those who received it. How then can the defendants complain? As unauthorised bankers, they were violators of the law; and objects, not of protection, but punishment. The repealing act, was a statutory pardon of the crime committed by the receivers of this illegal medium. Might not the legislature pardon the crime, without consulting those who committed it; or does it lie in the mouth of another culprit, *particeps criminis*, to object, on the ground of impairing his interest, in having the punishment inflicted, when that interest arose from a violation of the very law under which he

attempts to cover himself? How can the defendants say, there was no contract, when the plaintiff produces their written engagement, for the performance of a duty, binding in conscience, though not in law? Although the contract for reasons of policy, was so far void, that an action could not be sustained on it, yet a moral obligation to perform it, whenever those reasons ceased, remained; and it would be going very far, to say, the legislature may not add a legal sanction to that obligation, on account of some fancied constitutional restriction.

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There can be as little doubt but that the repeal was retrospective. There is no saving; but the terms are general and comprehensive. The provisions of the repealed section, not having been originally designed for the protection of the bankers, what motive could have existed in the mind of the legislature, for a discrimination between notes issued before the repealing act, and those issued after it. I understand the rule to be, that where a statute is repealed, without any particular saving, it is, as if it never had existed, except as to acts and proceedings, done and perfected, pursuant to it. *Rex v. The Justices of London*, 3 Burr. 1456. *United States v. Passmore*, 4 Dall. 372. Here the acts were not done in pursuance of the act of assembly, but in direct opposition to it.

On the case stated, another question arises, attended with more difficulty. By the terms of their notes, the defendants engaged to pay, "out of their joint funds, according to their articles of association," and it is made part of the case, that they have no joint funds. Shall they be compelled, to pay out of their separate estates? It is a general principle, that partners are liable to third persons, as for a personal debt. It is not merely the stock, they bring into the partnership, that is hazarded; but they are responsible to the extent of their individual fortunes; and such responsibility, cannot be limited, by any proviso in the articles of partnership, or agreement between themselves. But I see no reason to doubt, but they may limit their responsibility, by an explicit stipulation, *made with the party with whom they contract*, and clearly understood by him at the time. But this is a stipulation, so unreasonable on the part of the partnership, and affording such facility to the commission of fraud, that unless it appear unequivocally plain, from the terms of the contract, I will never suppose it to have been in

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the view of the parties. Unless the contrary clearly appeared, I would not suppose any one so imprudent, as to contract solely on the credit of a fund, exclusively within the controul of another, and of the solvency of which, he could not command the means of obtaining a knowledge. The management of it, and whether, at the day of payment, it will be sufficient, must necessarily be a secret, known only to the partners themselves. In this case, the supposition of a limited responsibility, would be doubly absurd. The payment was to be made, not only out of the joint funds, but also, "according to the articles of association;" and from an inspection of these, it appears, the company was to pay, only when convenient. The defendants say, the meaning of that is, they were to pay *specie*, only when convenient. But that is a distinction, without a difference; for a creditor is bound to accept nothing, but *specie*; and a payment in any thing else, is no payment at all. This arrangement was a deceit on the public; and though no fraud may have, in fact, been intended, it is still a circumstance of some weight, in the construction of legal intention. In these notes, there is a direct engagement to pay; and the mention of the fund, must be understood, *as directing its application as between the partners themselves*. Else why refer the mode of payment, to the articles of association, to which the person contracted with, was a stranger, without means of access; and with which he had no concern? It does not follow, that every promise, to pay out of a particular fund, is conditional. Whether a fund is mentioned as limiting the claim of the holder, or as only directing the application of the payment between the other parties, is a question of construction, with respect to which every case rests on its own circumstances, *M'Leod v. Snee*, 2 *Ld. Raym.* 1481. *Burchell v. Slocock*, 2 *Ld. Raym.* 1545. The absolving of corporators, from personal responsibility, has always a greater or less tendency to fraud. Where there is a divided responsibility to public opinion, the odium due to misconduct is bandied from one to another, till at length, it rests no where; and we sometimes see men, do things in a corporate character, which, as individuals, they would blush to be thought capable of. Hence, a necessity of holding them in check by individual interest. Private associations, therefore, attempting to arrogate to themselves, the attributes of a corporation, are entitled to no indulgence, and

more particularly this association, which carried on its operations, in open defiance of the laws of the country. An exemption from individual liability, is the most substantial benefit derived from a charter; the having perpetual succession, ability to sue, and be sued, corporately, &c. are only matters of convenience, that may be dispensed with. The defendants attempted, if they designed this clause for individual exoneration, to secure to themselves the substantial benefit of a corporate character, in a business forbidden by law, to all but corporate bodies. They have, therefore, no claim to an indulgent construction; and I am of opinion, the legal meaning of the contract is, that they are personally liable.

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DUNCAN J. The questions agreed by the parties to be raised on this record, are, 1st. Whether the notes were evidence, or afford any cause of action to the holder, in any form? and 2dly, If they do, are the defendants liable as partners, or liable only out of their joint funds, according to the articles of association?

The first is a question *stricti juris*, and whatever opinion the Court may entertain of the morality of the defence, it cannot influence their judgment on the law. To form a correct judgment on this, it is necessary to consider all the acts of assembly, on the subject of banking associations. By the 11th sect. of the act 28th March, 1808, 4 Smith, 536. citizens, or others associating, for the purpose of banking, shall be individually, and personally liable. By the act of 19th March, 1810, 5 Smith, 108. unincorporated banks are not to issue bank notes under a penalty; paying, or receiving such notes, is declared unlawful. By the act of 20th March, 1810, the first section of the act of 28th March, 1808, is repealed, 5 Sm. L. 153. By the act of 21st March, 1814, St. Laws, regulating banks, all unincorporated associations are declared unlawful; and the issuing of bank notes, by unincorporated banks, is declared unlawful; and all orders, and notes issued after the 1st January, 1815, payable to bearer, or order, in the manner or nature of bank notes, are declared to be absolutely null and void, and to have no effect, either in law or equity, and irrecoverable in any Court. It is under this act, that the defendants claim an exemption, and did it rest on this, there could be no recovery. But the plaintiff contends, that by

1818: the act of 22d March, 1817, this provision is repealed, and such notes are made recoverable, as if they had been lawfully issued. *St. Laws*, 141. The terms certainly embrace this case, and if the law is constitutional, confer on the plaintiff a legal remedy.

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This is not a legislation prohibited in express terms, either by the constitution of the state, or *United States*; it is neither an *ex post facto* law, which only relates to criminal matters, crimes, pains, and penalties, nor a law impairing contracts. It removes the impediment to recover on a contract entered into by the defendant. It is so far retrospective; but every retrospective law is not void. In general, retrospective laws divesting vested rights, working the destruction of a right previously attached, are justly reprobated, and seem contrary to the fundamental principles of sound legislation, and the social compact; but every retrospective law, is not void. Every law that is to have an operation before the making thereof, as to commence at an antecedent time, or to save time from the statute of limitations, or to excuse acts which were unlawful, and before committed, and the like, is retrospective; but such laws may be proper and necessary, as the case may be. There is a great and apparent difference, between making an unlawful act, lawful, and the making an innocent act, criminal, and punishing it as a crime. The meaning of the prohibition is, that the states pass no laws to deprive a citizen of any right vested in him, by existing laws. *Calder v. Bull*, 3 *Dall.* 396. A retrospective law divesting a right in that sense, would be against the constitution of the state, *Osborne v. Huger*, 1 *Bay*, 179. *Dash v. Van Kluck*, 7 *Johns.* 477.

The defendants claim exemption under the act of 21st March 1814. They say, it is true, we did promise to pay these notes, but this was an unlawful promise; prohibited by law. The plaintiff replies, but the prohibition is taken off, and the law has empowered me to recover from you, that which you promised to pay. The whole system was a matter of policy; the prohibition was not intended to confer any right on these associations, but merely as a measure of policy, to check a growing evil. This law divests no right, but removes an impediment; it renders lawful, an unlawful act, as if it had been lawful, *ab initio*; it works no injustice; is the invasion of no man's rights; it impairs no man's contract; but

takes from the contract the taint, which the policy of the moment imposed, and gives to the holder of the notes, a right to recover on the contract; a right which he would have possessed if there had been no legislative interposition. The interdiction is taken away, and the party is restored to his common law right, and common law remedy, as if the prohibitory act had not been passed. It is therefore evident, to me, that the plaintiff has his remedy on these notes, and that they were legal evidence.

On the second question, the personal responsibility, I know not any power, but that of the legislature, that can create a corporation; yet if these associations can contract debts, without a personal responsibility, payable only out of their joint funds, they possess all the powers and privileges of a corporation; they are *quasi* a corporate body. What is the judgment to be? what the execution? Can they be called on to enter special bail? Can their bodies be surrendered? Are they the subjects of execution of the person? On every suit is there to be an inquiry into the amount of their joint funds, and judgment taken for that amount, a kind of judgment *de bonis*, or judgment *quando acciderint*? But in the articles of association, is the liability restrained to the joint funds? Is there any article, exempting from responsibility beyond the funds? Art. 11th. "The debts of the association, shall be promptly discharged out of the joint funds, in current bank notes, unless it shall suit the convenience of the company, to pay specie." By this article, if it were binding on all who held their paper, no execution could issue but for current bank notes; for no judgment could be for specie; for that they were not bound to pay, unless it was convenient. A stipulation so idle and unmeaning, never can change the general law of the land; for according to the terms of this stipulation; they could not be reached at all. Current bank notes they might have none, and specie they are not obliged to pay unless it suited their convenience. Though the notes are made payable out of their joint funds, according to the articles of association, yet if their own articles could restrain the responsibility, they have not so done. An obligation to pay out of funds, where there are none, would be a fraud on the obligee. Where is the subscription of \$200,000? Have the instalments been all paid? This moonshine fund, this bubble, this bank without a charter, and without stock; for

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stock they have none, as appears by the record; subscription there is none found. Now the association was not to go into operation, until \$100,000 was subscribed. Their acting before, would be a fraud on all the world. On this ground, I am of opinion, that the defendants, who are found to be partners, under the name and firm, of "The Farmers' and Mechanics' bank, of *Fayette county, Pennsylvania,*" and who, as appears by the record, issued these notes, are liable as partners. Nor would I have any difficulty, were the articles of association more explicit than they are, and excluded from responsibility the associators, other than out of their joint funds; for though they might, as between themselves, stipulate with each other, for this contracted responsibility, yet as to the rest of the world, it is clear, that each partner is liable to the whole amount of the debts contracted. For partners in a stock divided into shares, and transferable, (but who are not incorporated,) are responsible beyond the amount of the shares to which they subscribe, though it is one of the terms of the association, they shall not be. 9 *East*, 527. *King v. Dodd*. So in *Waugh v. Carver*, 2 *H. Bl.* 235, where on articles of partnership it was stipulated between the *Carvers* and *Giesler*, that neither of them should be answerable or liable for the acts of the other; but that each shall with his own goods and effects, and in his own person respectively be answerable and accountable for his own losses, acts, deeds and receipts, and that the articles shall not bear reference to their particular separate mercantile concerns or connections, the limitation though binding as between the partners, did not restrain their amenability as partners, as to third persons. There may exist a limited partnership, confined to a particular trade or business; there the partners are not bound by the contract of a copartner not connected with such trade or business, entered into with a third person, having notice of the limited nature of the partnership. 2 *Johns*. 300. *Lansing v. Gaine and another*, and 4 *Johns*. 251. *Livingston v. Roosevelt*. Here was a limited partnership, for the business of banking; and for all contracts connected with that business the partners are liable. Thus in secret partnerships, though such secret partnership cannot enter into the consideration of the creditor, yet for reasons of policy, and general expedience, the law is positive, with respect to secret partners, that when discover-

ed, they shall be liable to the whole extent. In many parts of Europe limited partnerships are allowed, provided they are entered on a register, but such is not the law of England, nor of this country. *Coope v. Eyre*, 1 H. Bl. 37. Legal corporations are known, can be made responsible by their property, and punished by the forfeiture of their charter. The mode of coming at their property is pointed out by law; but here we are without any guide; these self created bodies corporate, would be without any check or controul, did we lose sight of the individuals; was there no individual existence.

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The numerous chartered banks, with a *bonus* given for a charter, for a limited period, afford strong evidence of the general opinion both of the government who chartered, and of the numerous speculators, who have paid for charters.

I am therefore of opinion, that the judgment be entered generally against the defendants.

Judgment affirmed.



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September 9.

IN ERROR.

A testator devised his real estate to D. C. and R. T. in trust as to one equal half part, for the use of his "old friend, companion and house-keeper, E. H. and as to the other half part for the use of his natural son J. L.; the survivor of either to possess the whole of the said estate by will or otherwise."

He afterwards, at different times, added the following codicils:

1st Codicil, "I do make this codicil in alteration and addition of the within, viz. One thing was omitted in the above recited testament, of mention made, (as was

intended,) in case of no legitimate heirs of the bodies of the two legatees or ere," (either,) "one of them, that after his or her decease, it should revert to the heirs of my sister, J. S. wife of G. S. to be equally divided between them as my next of kin, who have deserved of me by writing, &c. lately, the others being provided for."

2d Codicil, "I do authorise and request my good friends D. C. and R. T. on account of an unfortunate intoxication of my house-keeper since said will, that they would proportion her subsistence, which I wish and will to be not less than 12*l.* *per annum*, or more than 20*l.* paid quarterly, or upon good behaviour, and her remaining ten or twelve miles out of Easton, and that she or any other person may be prevented from wasting my estate, as the reversion of the same is left to my sister J. S.'s children, as per codicil of my former will."

3d Codicil, "I am willing to allow my house-keeper, E. H. one furnished room in the house I now occupy during her natural life, and 20*l.* a year paid monthly, if required by her or order; but no part of the property of said room, or monthly allowance, shall be disposed of by her, she being for the most part insane."

*Held*, that E. H. and J. L. did not take cross-remainders; but that on the death of E. H. without issue, the moiety of the estate devised to her went immediately to the children of J. S. the testator's sister, to be equally divided between them, in fee simple.

THIS was an ejectment in the Court of Common Pleas of *Allegheny* county for 259 1-10 acres of land in *Elder's* district. It was tried on the 4th *April*, 1818, when it appeared, that both plaintiffs and defendant claimed under the will of the late Dr. *Andrew Ledlie* of *Easton*, in *Northampton* county, who it was admitted was seised in fee simple of the premises in question. The plaintiffs claimed under an alleged devise to them as the heirs of *Isabella Simpson*, the testator's sister, and the defendant under a devise to *John Ledlie*, alias *John Butler*, from whom he had regularly derived his title.

The will, on the construction of which the case depended, was made at *Easton* in *Northampton* county, on the 8th *January*, 1791, and contained, *inter alia*, the following devises and bequests. "Item, As to my estate in *Pennsylvania* or elsewhere, in *America*, both real and personal, I give and bequeath to *Daniel Clymer* and *Robert Trail*, esqs. in trust nevertheless for the uses hereinafter mentioned, that is to say: one equal half part to my old friend, companion, and house-keeper for the last twenty-five years, *Eleanor Hunt*, and the other half of my said estate, I will and bequeath to my natural son *John Ledlie*, son of *Bridget Butler*; the survivor of either to possess the whole of said estate, either by will

or otherwise." *Daniel Clymer* and *Robert Trail*, esqs. were appointed executors, and *Eleanor Hunt* executrix. 1818.

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On the 31st *October*, 1793, the testator added a codicil to his will. The part of it which is material, was in these words: "One thing was omitted in the before recited testament, of mention made, (as was intended) in case of no legitimate heirs of the bodies of the two legatees or ere one of them, that after his or her decease, it should revert to the heirs of my sister, *Isabella Simpson*, wife of the Rev. *George Simpson*, to be equally divided between them, who live in *Armagh* in the north of *Ireland*, as my next of kindred, who have deserved by writing, &c. lately, the others being provided for."

Another codicil was added on the 28th *May*, 1794. "In addition and continuation of my former will and codicil, I do authorise and request my good friends, *Daniel Clymer* and *Robert Trail*, esqs, on account of an unfortunate intoxication of my house-keeper since said will, that they would jointly and severally proportion her subsistence, which I wish and will to be not less than twelve pounds per annum, nor more than twenty pounds, paid quarterly; or upon good behaviour, and her remaining ten or twelve miles out of *Easton*; and that she or any other person may be prevented from wasting my estate, as the reversion of the same is left to my sister *Isabella's* children, as per codicil of my former will."

On the 1st *July*, 1794, the testator made a third codicil, which was as follows: "In addition or continuation of my last will and testament, wherein my two friends, *Daniel Clymer* and *Robert Trail*, esqrs. that I find myself further under the necessity of reminding them of the situation of my affairs. I am willing to allow my house-keeper, *Eleanor Hunt*, one furnished room in the house I now occupy during her natural life, and twenty pounds per year, if she behaves prudently; if not, to be reduced to twelve pounds per year, paid monthly if required by her or order, but no part of the property of said room, or monthly allowance, shall be disposed of by her, she being for the most part insane."

*Dr. Ledlie*, the testator, died in *January*, 1795, and *Elean*  
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**ROBERTS**, President, charged the jury in favour of the defendant, giving it as the opinion of the Court, that under the will and codicils, an estate tail vested in *Eleanor Hunt* and *John Butler*, with cross-remainders in tail, remainder in fee to the heirs of *Isabella Simpson*; that therefore, upon the death of *Eleanor Hunt*, her moiety vested in *John Butler*, and that the remainder in fee could not vest in the heirs of *Isabella Simpson*, except in the event of *John Butler* dying without issue, and without having barred the estate tail in his lifetime.

This opinion being reduced to writing and filed of record at the request of the plaintiff's counsel, the cause was removed by writ of error to this Court, where it was argued by *Wilkins* and *Campbell*, for the plaintiffs in error, and by *Baldwin*, for the defendant in error. The Judges in giving their opinions, have fully stated the ground on which the argument proceeded.

**TILGHMAN C. J.** This is a question on a devise in the last will and testament of *Dr. Andrew Ledlie*, of *Easton*, in *Northampton* county. The difficulty is, to discover the intention of the testator, who drew the will himself, and by adding several codicils, has rendered his meaning, taking into view both will and codicils, not a little doubtful. He appears to have been a man of a singular mind, of a benevolent cast indeed, but tainted strongly with vanity, and subject to violent passion. This is evident from the eccentric directions respecting his funeral, the place of his interment, his tombstone, his epitaph, and the strong resentment expressed against a certain person whose name he has introduced into his will, without any intention of giving him a legacy. He had neither wife, nor lawful child, but at the time of writing his will, (8th *January*, 1791,) his affections seem to have been centered in an old house-keeper, and a natural child. He had near relations in *Ireland*, for whom he entertained but little regard, and they, as it would seem from some expressions of his, had shewn as little regard for him. Intend-

ing to give his whole estate in *Pennsylvania* to his house-keeper and child, he expressed himself, in the will of *Ja-<sup>1818.</sup>nuary, 1791*, in terms sufficiently clear. "As to my estate in *Pennsylvania*, or elsewhere, in *America*, both real and personal, I give and bequeath it to *Daniel Clymer* and *Robert Trail*, esqrs. in trust, nevertheless, for the uses herein after-mentioned, that is to say, one equal half part to my old friend, companion, and house-keeper for the last 25 years, *Eleanor Hunt*; and the other half of my said estate, I give and bequeath to my natural son, *John Ledlie*; the survivor of either to possess the whole of said estate, either by will or otherwise." Here is a plain intent to make the devisees tenants in common, (a moiety to each,) during their joint lives, and to give a fee simple in the whole to the survivor of them. On the 81st *October, 1793*, a codicil was made, and it appears, that between the time of making the will and the codicil, the mind of the testator had experienced some change. His dormant affections had been revived, by letters received from some of his relations in *Ireland*. Having declared, in the preamble of the codicil, "that he had altered, in some measure, his intentions," he goes on to say, "I do make this codicil in alteration and addition of the within, viz. one thing was omitted in the before recited testament, of mention made, (as was intended,) in case of no legitimate heirs of the bodies of the two legatees, or ere one of them, (that is the expression, meaning either of them,) that after his or her decease, it should revert to the heirs of my sister, *Isabella Simpson*, wife of the Rev. *George Simpson*, to be equally divided between them, who live near *Armagh*, in the north of *Ireland*, as of my next of kin who have deserved of me by writing, &c. lately, the others being provided for." What did the testator mean? Did he intend, that there should be cross-remainders between his house-keeper and son, so that his sister's children should not come in for any part, until there was a failure of issue of both the first devisees, or that as soon as one should die without issue, the remainder of a moiety should go immediately to his sister's children? Considering the words of the codicil by themselves, without reference to any other expressions in the subsequent codicils, I should think the most natural construction would be in favour of an estate tail to each with cross-remainders in tail; and remainder to his sister's children in fee. But another construction may be given

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without violence to the expressions; and from what was afterwards said by the testator, I incline to the opinion, that he has explained his meaning to be, that on the death of *either* of the first devisees without issue, the moiety of the one so dying should go at once to his sister's children. On the 28th May, 1794, he made a second codicil. In this he mentions, that his house-keeper had unfortunately fallen into a habit of intoxication, and adds, "I request my trustees to proportion her subsistence, which I wish and will to be not less than 12*l.* nor more than 20*l.* paid quarterly, or upon good behaviour, and her remaining 10 or 12 miles out of *Easton*, and that *she* or any other person or persons may be prevented from wasting my estate, as the reversion of the same is left to my sister *Isabella's* children, as per codicil of my former will." On the 1st July, 1794, the testator made another and his last codicil, in which he says, "I am willing to allow my house-keeper, *Eleanor Hunt*, one furnished room in the house I now occupy, during her natural life, and 20*l.* a year, if she behaves prudently, if not, to be reduced to 12*l.* a year, paid monthly, if required by her or order, but no part of the property of said room or monthly allowance, shall be disposed of by her, she being for the most part insane," &c.

I am far from being satisfied, that it was not the intent of the testator to reduce the devise to *Eleanor Hunt*, to a life estate at most, for she had no legitimate child, nor was it in the least probable, that she ever would have. But I think it may safely be concluded, that the testator had no idea of cross-remainders between her and his son. Her situation and his opinion of her forbid such a supposition. And when he says, in his second codicil, that the reversion of the estate was given to his sister's children, I understand it, that he alluded to the reversion of *Eleanor Hunt's* estate, because he had been just speaking of her. It is unnecessary to perplex ourselves with conjectures concerning the quantity of the estate which it was really intended *Eleanor Hunt* should take, because that matter is immaterial to the plaintiffs. Whether she took an estate for life, or in tail, with remainder to the children of the testator's sister, or in fee simple, with an executory devise to those children, on the contingency of her dying without issue living at the time of her death, is of no importance; because, having died without issue, the estate devised to her, is at an end. The only material question is,

whether on a fair construction of the will and codicils, there was an implied remainder to *John Ledlie* to take effect by way of cross-remainder, immediately on the expiration of the estate of *Eleanor Hunt*. If he had such a remainder, *Eleanor Hunt* must have had a like remainder on the expiration of his estate. But this, I think, cannot be supposed to be in accordance with the will of the testator. Cross-remainders are not favoured in law, nor are they implied, but from necessity. Here, they are not expressly given, and to imply them, would not only be without necessity, but against the mind of the testator, not expressed indeed, but sufficiently implied. I am, therefore, of opinion, that there were no cross-remainders, but that on the death of *Eleanor Hunt*, without issue, her moiety of the estate of Dr. *Ledlie* went immediately to the children of his sister *Isabella*, to be equally divided between them in fee simple. The judgment of the Court of Common Pleas must, therefore, be reversed, and a *venire facias de novo* awarded.

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GIBSON J. The intention of the testator must prevail, but particular rules of exposition are established, by which we are to arrive at it. The *real* intention can seldom be ascertained; it can in most instances be but guessed at, and not being known, it is impossible to execute it. Such, beyond question, is the case with respect to the will under consideration. It is therefore better on the score of policy, to adopt even an artificial process of reasoning, that will afford certainty of result, than, by abandoning all rule, to introduce the uncertainty of decision and consequent insecurity of title, that would ensue from the blind gropings of the most acute mind. Nor would we be more likely to reach the actual intention by being unfettered by rules; but on the other hand much as to certainty of decision would be lost. In the present case it appears the testator was unacquainted not only with the meaning of technical words, but even with the force and necessary arrangement of the most common words in our language; and therefore little will be gained, by abandoning technical meaning, to enquire after the actual intention, when the testator understood the language of common parlance, little, if any better, than technical language. It will be impossible to give a sound legal construction to this will, and its several codicils, or ascertain the force and

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meaning of any particular expression, without referring to the whole, as an entire instrument. I shall therefore consider the will, and the codicil of the 31st *October*, 1793, together, and then enquire, whether there has been any new disposition by the two last codicils, affecting the question before us. Now in the will, the intention of the testator is clearly and unequivocally expressed, that the survivor of the two immediate objects of his bounty, *should take the whole estate*, and no disjoinder is contemplated; this is as clear as words can make it. But by the codicil, it is limited over to the plaintiffs, "in case of no legitimate heirs *of the bodies of the two legatees or ere one of them.*" I admit the kind of failure of heirs the testator had in view is not very explicitly described. He employs for that purpose two distinct clauses, each of them susceptible of a double and opposite meaning. "In case of no heirs of the body of the *two*," may mean, that the estate shall go over at the death of one, unless both shall have issue living, for if but one had issue it might with propriety be said there were not heirs of the bodies of *both*, or as he expresses it, *the two*; or it may mean a failure as to each, in which case the expression would be equally satisfied; for it could not be said there were *no* heirs, if either had issue. So of the second clause; in case of no heirs of the body "of either of them," is satisfied if *either* be without heirs; and it is not satisfied if either *have* heirs, for it cannot be then said there are *no* heirs of either, or as he expresses it "*ere one of them.*" The meaning is entirely changed by changing the emphasis. Nothing is therefore gained by analysing the language, which is always an unsafe and unsatisfactory means of arriving at the intention. Effect is to be given, if possible, to every expression in a will, and hence it is argued, but without force, that the testator must have meant to express by the second clause something different from the first, or he would not have used it, and meant to express that the estate should go over on a failure of issue of both *or either*. But if he intended a part to go over on a failure as to one, it would have been unnecessary to make provision for a failure as to both. In all cases where similar expressions have been used, cross-remainders have been raised; as in the case put in *Cole v. Livingston*, 1 *Vent.* 244, of a devise of *Blackacre* to *A, Greenacre* to *B*, and *Whiteacre* to *C*, and if they die without issue of their *bodies, vel alterius eorum*; it was said by

reason of these latter words there would be cross-remainders. 1818. This is precisely our case, except the number of the bodies *Pittsburgh.* from which the issue is to spring, is not expressed; but that is altogether immaterial to the sense. So in an anonymous *Simpson and others* case in 3 *Dyer*, 303, *b.* devise to five, and the heirs of their *v.* bodies, and if they *all five* should happen to die without issue *Coor.* male of their bodies *or any of their bodies*, then over; and it was held to be a case of cross-remainders. This is a stronger case than ours. But independent of authority, there is one thing in this codicil that lets us into the intention, and which governs the construction, and determines the meaning of every expression in it. It is this; the very *same* arrangement he afterwards made by this codicil, he intended to insert in his will, for he expressly says he *then* had in view the very *same* limitation to the plaintiffs. The codicil itself is ushered in with the declaration that, "one thing was *omitted* in the before recited testament of mention made, (*as was intended*,) that in case of no legitimate heirs, &c. "of the two devisees, &c." then follows the devise to the plaintiffs. Now nothing can be clearer than that the survivor of the two immediate devisees, in case of failure of issue, was by the will to have all. Then we have his declaration, he did not, by this codicil mean to make any *new* disposition of his property *inconsistent with the will*, or to alter any part of it, but to complete the arrangement he *originally had in view*, a part having been omitted by an oversight. This he has declared, not in terms, but substantially; unless we are to suppose, that, at the time of making his will, he intended that it should contain two dispositions of the same property, not only inconsistent with, but diametrically opposite to each other; a thing not to be credited. By the will there is an explicit declaration of intention, that the whole estate is to be united in the person of the survivor. By the codicil, an estate tail is vested in the immediate devisees by implication, and if the part of the person first dying without issue is to go immediately over, it is certain the provision in the will must be *defeated*. If then the testator, when he made his will, had in view to provide for the plaintiffs exactly as he afterwards did by the codicil, and if the latter cannot, as he tells us, be referred to an intervening change of intention, must not its construction be subordinate to, and governed by the prevailing object of the testator when he made his will,



1818. *Pittsburgh.* which was to give the whole estate to the survivor of the two immediate devisees, in case the other died without issue. Would not that be the construction, if the provisions of the codicil had been originally embodied in the will? In that case certainly no implication would prevail against the express direction of the testator: I therefore prefer giving the same meaning to both clauses that describe the contingency. I consider the last as redundant, and intended to express what had been sufficiently expressed before. The time also when the limitation over is to take effect must be governed by the same consideration; "his or her decease" must mean, not the decease of the party first dying without issue, but that of the survivor as the event should turn out, and thus the will and codicil, will be rendered consistent with each other, as the testator all along intended they should be. In fact any other construction would seem to oppose the evident *actual* intention. The words of the codicil are, "in case of no legitimate heirs, &c. that after his or her decease, it should revert to the heirs of my sister *Isabella*, to be equally divided between them, &c. who deserve by writing *late-ly*, &c." What is here referred to by the relative word "*it*?" It would do violence to a grammatical rule of construction to say it is a part of the estate. The word relates to something said before in the will, which for this purpose, is to be taken in connection with the codicil. The last antecedent, and that to which this word must refer, is found in the last clause of the will, and by that the testator speaks of the *whole* estate; the word therefore refers to the whole estate. Nor is there any thing to induce a doubt of this being in accordance with the actual intention, but on the contrary, something to make us think it strictly so. With respect to a division, as between the first two devisees, and also between the present plaintiffs, the testator is studiously explicit; but as to a separation of the estate as concerns its going over, he seems intentionally silent. As to his saying, the plaintiffs deserved by writing lately, it cannot be inferred from that, he intended to change the dispositions in the will, for he tells us he did not. These letters of enquiry again directed his attention to the will, and led to a discovery of the omission to provide for the plaintiffs as he originally intended, and this was supplied by the codicil, but we cannot infer that they had any other effect. It is however argued, that the estate being

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given by moieties, the devisees were tenants in common, and that a disjoinder of their interest is inconsistent with the presumption, that cross remainders were intended; a necessary and irresistible implication, being, it is said, essential to create them. But a disjoinder of the estates as between the first takers is no further material than as it may seem to indicate a severance of the inheritance, and we find instances of cross remainders being implied, not only between tenants in common, but even where the possession was several, as in the case put in 3 *Blac. Com.* 381. The case in *Cro. Jac.* 655. which says, cross remainders cannot be implied, where the first devisees take in severalty, is, I apprehend, not law; the severance must be continued throughout. They may be implied between any definite number, and the rule is, that where they are to be raised between two and no more, the presumption is in their favour, but where between more than two, it is against them; but the presumption either way, may be rebutted by circumstances of plain intention inconsistent with it.

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Then as to the operation of the two last codicils. It is argued, that however the matter might stand on the will and first codicil, the devise to *Eleanor Hunt*, is revoked by the remaining codicils. If it were so, I am not quite sure it would affect the question. Cross remainders in tail, limited after a preceding estate tail, are not contingent, but vested. It might therefore be, that the destruction of *Eleanor's* estate, would not defeat the remainder in tail limited to *John*. Whether the devise of an interest by the description of a remainder would be void, because the testator had revoked the devise of the preceding particular estate, thus leaving at his death, no remainder for the words of the devise to operate on, it is unnecessary to determine; for there is no reason to say these latter codicils revoked any thing. There are no express words; and revocations arising from inconsistency of disposition, will not be admitted except where the inconsistency is plain and unavoidable. The latter codicils contain a *personal modification* of the devise as to *Eleanor*, and nothing more. She is still to have an estate of inheritance, but is to be restrained by the trustees from committing waste, and she is limited to a partial perception of the profits. This restriction was applicable to her personally, and would not have affected her issue, if she had left any. Was this incon-

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sistent with her having an inheritable estate? Where lands are devised to *A*, and afterwards by the same will, to *B*, they will be made joint-tenants, rather than the latter part should be esteemed a revocation of the former. I confess, I would be inclined to strain the construction, if that were necessary to give *Eleanor* an estate of inheritance, rather than deprive *John Ledlie*, of the remainder, as I feel convinced it was the intention, that no part of the estate should go over, while issue of his remained. He was the testator's natural son, and the principal object of his bounty; and it would have been unnatural to exclude him, in favour of the testator's more remote kindred. No inference of intention can be drawn from the advanced age of *Eleanor*, and the little probability there was of her having issue. We do not know her age, but she had been the house-keeper of the testator for twenty five years, and although it may not be probable she was capable of procreation, still there was no impossibility in the way. Women have borne children when considerably in advance of fifty. But it is clear the testator *thought* she might have issue; else why provide, as he certainly did, for an event he knew could never happen. This supposition on his part, whether well or ill founded, is sufficient for every purpose of explanation as to his intention and motive, for giving her an estate of inheritance. I therefore think her age and infirmities cannot be called in aid of the argument, that the devise to her under the will and the first codicil, was revoked. The two latter codicils contain a modification of her right of enjoying the estate, but a modification, not extending to her issue, or changing the nature of her interest. But reliance is put on the direction in the codicil, of the 28th May, 1794, requiring the executors "to take care that she or any other person may be prevented from wasting the estate, as the reversion of the same is left to my sister *Isabella's* children, as *per codicil of my former will*," and it is inferred, this clause indicates an intention, that *Eleanor's* portion of the estate, should go over immediately on her death, as the estate was to be preserved for *Isabella's* children, without saying a word about its being preserved for *John Ledlie*. But here again the meaning is made manifest, by a reference to something said before. If the first codicil is not inconsistent with the provisions of the will, (and I trust I have shewn it is not,) neither is this. The estate is to go

to *Isabella's* children; but how? "*as per codicil of my former will.*" He did not intend it to go differently from what he formerly directed, and this codicil, instead of being a key to the first, must itself receive an explanation from it. But it would have been absurd in the testator to direct the estate to be preserved for *John*, or any body else but the plaintiffs; for *Eleanor* might have outlived *John*, and he could only take, in the event of surviving her, which was altogether uncertain. If the direction had related solely to *Eleanor's* portion, there would be more force in the argument, but it related to the *whole* of the estate, and to *John Ledlie*, as well as her. How can we infer, then, the testator had in view, the event that has since happened, the death of *Eleanor* without issue, in the life time of *John*, and that he meant to provide for it. I view this clause as a general direction to preserve the estate as it was, *ultimately* to go to the plaintiffs, the only persons in whom a remainder would certainly take effect in possession. It is clear that in no other part, is there any thing that serves to point them out as the objects of the testator's immediate bounty. Of so little concern was their interest, that it was entirely overlooked in the will, though the testator tells us, he intended from the first to provide for them in the way he ultimately did. Giving its fullest force to the declaration of the testator, that the reversion was left to the children of his sister *Isabella*, it can give rise only to a *suspicion* that he intended they should have *Eleanor's* part at her death, and is not sufficient to outweigh the positive declaration in the will uncontradicted in every other part, that the survivor of the two immediate devisees should have the whole. I therefore do not consider the two last codicils as *contradicting*, or even explaining in any respect, the disposition of the estate, by the will and first codicil.

I am of opinion, *John Ledlie*, and *Eleanor Hunt*, took estates tail by implication, with cross remainders in tail, remainder to the plaintiffs in fee; and that therefore, the judgment should be affirmed.

DUNCAN J. This controversy arises on the will and codicils of *Dr. Andrew Ledlie*. In giving a construction to this very obscure testament, the will and codicils are to be conjointly considered as one entire disposition. They are all the work of the testator; the declarations of his intention, as

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new ideas started up in his mind, as events arose requiring in his opinion a modification or alteration of his original plans. Whatever that intention was it must prevail; the difficulty is in ascertaining it; when ascertained, there is no legal impediment to give it its full effect.

"As to my estate in *Pennsylvania* or elsewhere in *America*, both real and personal, I bequeath to *Daniel Clymer* and *Robert Trail* in trust, nevertheless, for the uses hereinafter mentioned, that is to say, one equal half part to my old friend, companion, and house-keeper for the last 25 years, *Eleanor Hunt*; and the other half of my said estate I will and bequeath to my natural son *John Ledlie*, son of *Bridget Butler*, the survivor of either to possess the whole estate by will or otherwise." This will bears date the 8th *January*, 1791. Did it stand on the will alone, *Eleanor Hunt* and *John Ledlie* would be tenants in common in fee with the benefit of survivorship. On the 31st *October*, 1793, the first codicil is executed, in which he declares as follows: "One thing was omitted in the before recited testament, of mention made (as was intended) in case of no legitimate heirs of the bodies of the two legatees or ere (either) one of them, then after his or her death, it shall revert to the heirs of my sister *Isabella Simpson*, to be equally divided between them as my next of kin, who have deserved by writing, &c. the others being provided for." This codicil is not free from doubt. It is contended by defendant, that the benefit of survivorship was conferred by the will, and that the testator on re-perusing his will confined this to one event; the dying without issue; thus providing for the issue of each devisee; this was the omission intended to be supplied by the codicil; and that by the will and codicils taken together *Eleanor Hunt* and *John Ledlie*, become tenants in tail; and that they took by way of cross-remainders; that on the death of one without issue, it would go to the person surviving; and that on another event, the death of both without issue, it would go to the heirs of *Isabella Simpson*. On the other hand, it is contended, that here were other objects of the testator's bounty intended to be provided for; his sister's children, his next of kin who had deserved provision; as all his other next of kin had been provided for; and that on the death of any one of the first takers without issue, the part of such one, on his or her death, was to go over to his sister's children. But on

the 28th *May*, 1794, there is another codicil,—“In addition 1818.  
and continuation of my former will and codicils, I do autho- *Pittsburgh.*  
rise and request my good friends *Daniel Clymer* and *Robert* *Simpson*  
*Trail*, on account of an unfortunate intoxication of my house- *and others*  
keeper since the said will, that they would jointly and sever- *v.*  
ally proportion her subsistence, which I will not to be less *Cow.*  
than 12*l.* nor more than 20*l.* per annum, payable quarterly, or  
on good behaviour, she remaining 10 or 12 miles out of *Eas-*  
*ton*; and that she or any other person may be prevented from  
wasting my estate, as the reversion is left to my sister's chil-  
dren.” This codicil gives a strong view of the testator's in-  
tention; it is his own construction of his own writing. And  
again, on the 1st *July*, 1794, he adds a third codicil,—“I find  
myself further under the necessity of reminding my trusty  
friends, *Daniel Clymer* and *Robert Trail*, of the situation of  
my affairs. I am willing to allow my house-keeper, *Eleanor*  
*Hunt*, one furnished room in the house I now occupy, *during*  
*her natural life*, and 20*l.* a year if she behaves prudently; if  
not, to be reduced to 12*l.* per year, paid monthly; but no part  
of the property in the said room is to be disposed of by her,  
she being for the most part insane.” The testator died in  
*January*, 1795. *Eleanor Hunt* died a few days after him,  
without issue. *John Ledlie*, or *John Butler*, as he is called,  
is still living.

The plaintiffs in error contend, that by these two last codi-  
cils the will is revoked, and other provisions substituted;  
and that she has, out of that part of the estate devised her by  
the will, certain privileges and allowances during her life;  
and that the estate devised to her was to remain in the hands  
of the trustees during her life, and on her death was to be  
delivered over by the trustees to them, unimpaired by waste.

A codicil, unless it contain express words of revocation,  
is no revocation of a preceding will to which it is applicable,  
except precisely in the degree expressed, leaving the particu-  
lar dispositions unaffected thereby, as well as the instrument  
in all other respects precisely in the same state in which it  
finds them. *Pow. Dev.* 544. A codicil inconsistent with a pre-  
ceding will, is in law a revocation of it. *Ib.* 542. A codicil  
being considered as part of the will, and taking effect with it  
at the death of the testator, is in its own nature not intended  
to be a revocation of the will or of the particular dispositions  
thereof, further than as specifically altered thereby. Is the

1818. devise to *Eleanor Hunt* specifically altered? The inclination of my opinion is, that there is a specific alteration; how far, or what its effect may be on the interest of *John Ledlie*, is to be considered. The situation of *Eleanor Hunt* was deeply impressed on the testator's mind. Whatever his views were as to her in *January*, 1791, when he executed the will, or in *October*, 1793, when he added the first codicil, in *May* and *July*, 1794, when he added the second and third codicils, they were totally changed on account of the intoxication and imprudence of his house-keeper, for the most part amounting to insanity. Instead of one-half of the estate, she is to have no estate, interest, or power of disposition of anything; a bare subsistence; 12*l.* or 20*l.* depending on the discretion of the trustees; restrained as to her place of abode by one codicil; a furnished room, by another, during life, without the power of disposal; the small pittance allowed her she is prohibited from disposing of. It is inconsistent with the whole scope of these codicils and of the testator's manifest intention, that she should be tenant in tail of one-half of all; the small provision depending on her good behaviour; the restraint as to her abode; the furnished room for life; the power denied her on account of her insanity to dispose of an article of the smallest value; all these unite to shew, that the testator did not intend that she should have either interest, power, or authority over, in, or on account of any part of it; much less, that on the death of *John Ledlie*, without issue, she should have the whole. By the will, she would be tenant in common with *John Ledlie* in fee of the whole estate; by the first codicil tenant in tail; by the second and third she is restrained to the possession of one room for her life, of his whole real estate. All this is totally repugnant to the will and first codicil. Great and important changes are introduced totally incompatible therewith. I never can believe it was the intention of the testator, that she whom he had thus cut off, for the special reasons assigned by him, from all but the specific provision, should have the disposition of one-half the profits of the estate and its management, and that in one event, she should become mistress of the whole. She was executrix under the will. Did she remain so under the two last codicils? She is represented by the testator as unworthy of all confidence; unfit to be trusted with the care of any thing. Shall she yet remain, incapable and insane as he has declared

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her, an executor of his will? When the testator made the two last codicils, it was not in his view to provide for the issue of a drunken, insane, unmarried, old woman. What then was the intention of the testator with respect to this portion of the estate; what was to become of it during her life? The trustees were to take care of it; were to support her; and on her death were to deliver it over, without waste done or suffered, to the children of *Isabella*. The devise to the trustees was not revoked, but the uses and trusts were changed; to them in trust to make the allowance, &c. for the support of *Eleanor Hunt*; on her death to be delivered to *Isabella Simpson*'s children. This construction may, as I believe, be fairly drawn from the general tenor of the will, and would best effectuate the general intention of the testator. He expressly declares in his first codicil, that he has altered his intention from certain circumstances happening since the making of his will, and in terms revokes the provisions in his will altered by the codicil. But if doubts are entertained as to this, and if the will and first codicil remain unrevoked as to the disposition to her, does *Jahn Ledlie* on the death of *Eleanor Hunt* take by cross-remainder? This is matter of mere intention. One can receive little aid from books on this very obscure will. Cases might puzzle and perplex, but cannot enlighten our path, in the endeavour to discover the real intention of this testator; there are no technical rules, or construction of legal terms to stop our inquiry; every word must be weighed to come at the intention. "In case of no legitimate heirs of the bodies of the two legatees," would by necessary implication create cross-remainders as between them. If such had been the testator's intention, there would have been no occasion for further explanation; but he has thought proper to explain this; for he adds the alternative, "if *ere* one of them die without legitimate heirs, it shall revert to my sister *Isabella*'s heirs." If the word, *or*, is allowed to have been used in its proper sense, indicating clearly some alternative in his contemplation, what is that alternative? If it were omitted, it would clearly appear from the context, what that alternative was, *viz.* the death of either without legitimate heirs of the body. But the alternative is clearly expressed; or if any of them shall so die, on his or her death it shall revert; that is, on either event, *viz.* the death of both without heirs of the body, or any one of them without heirs of his or her

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1818. *Pittsburgh.* body. A difficulty is suggested as to what part shall go over. On reflection this vanishes. If both die, the whole shall go over; if any one of them, the part of him or her dying, on his or her death, shall go over. This reading of the will makes it natural and intelligent throughout. This is not an unauthorised liberty taken with the will, for in *Spalding v. Spalding*, *Cro. Car.* 185, where a man having three sons, *John*, *Thomas*, and *William*, devised lands to *John* and the heirs of his body, after the death of *Alice*, the testator's wife; and if *John* died, living *Alice*, that *William* should be his heir; and the Court then, from the apparent general intent, supplied after, "if *John* should die," the words "without issue," so as to vest the remainder in *William*, on *John's* dying without issue, living *Alice*. So in *Fonereau v. Fonereau*, 3 *Atk.* 315, where the testator left £54,000*l.* to be paid to his children, share and share alike, and after their decease, the principal equally among their issue, and in case all the issue of any one child should die before twenty-one, the share of such child to be divided among the surviving children of the testator, Lord HARDWICKE held, there could be no reason for a devise over in the case of the issue of a child dying, and not in the case of a child itself dying without issue; and decided it should go over, supplying the words giving over the share of a child who had no issue. These cases are stronger, for in them the structure of the sentence was perfect, without any alteration or addition of words. It was observed in that case, that people frequently differ in expression, though they mean the same thing, and it would be construing wills by too great a nicety, to lay weight upon strict form of words, where the meaning is plain. The codicil of *May*, 1794, affords us the testator's own construction. It appears by the first codicil, that these plaintiffs had lately become the objects of the testator's bounty. As they were deserving and unprovided for, the testator intended, and declares his intention, to make some provision for them. The death of an ancient unmarried woman without heirs of her body, would be an event the testator contemplated must happen in a very short period. This would afford in some short time a certain provision for them, but it would be nothing to provide for them on an event not likely ever to happen, and which, even did it happen, the probability was it would not afford them any provision; the death of *John Ledlie*, a young man and an

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indefinite failure of issue, it was making a promise to the ear and breaking it to the hope; it would indeed be precarious and illusory. With the unprovided state of these children in his eye, how anxiously does he guard their interest? The trustees are enjoined to prevent it from being wasted; why? Not because it was to remain to *John Ledlie*, his natural son, but because the reversion, the word here used by the testator as remainder, was left to his sister's children; of what? of the part devised to *Eleanor Hunt*. I never can consider this as a remainder depending on the death of both without issue. Why, if *John* was the remainder-man intended, not so express it? He certainly considered not *John* as the person who would be immediately injured by waste; it never could be his intention to provide here for a remote remainder and pass on in silence a remainder which he knew must take place shortly after his own decease. Although I do not know that any precedents can shed light on the intention of this testator, as no will ever used the language employed by him, and as no rule can be drawn from other wills on a construction simply of intention, further than as they give us the opinion of learned men on the natural construction and import of words and the structure of sentences; as such they are to be considered with respect; but where a case is not cited for the sake of some principle or rule, but to shew certain expressions cannot or must not have this or that construction put upon them; such cases can only rule other cases where the subject matter of construction is not to be distinguished. In cases where technical language is used a course of decision on the nature of the estate devised, must be submitted to as binding, otherwise there would be an end of all certainty and all depend on the arbitrary construction of Courts. The leading cases are collected in *Williams's* note to *Cook v. Gerrard*, 1 *Saund.* 185, note 6. All of them depend on the use of particular expressions denoting an intention, that the whole shall go together; and at the same time they one and all, establish a separation of the parties or of the remainder over on the death of any one of them, and the presumption of cross-remainders is rebutted. It is on this principle the case of *Wright v. Holford*, *Cowp.* 31, was decided. The certificate of the King's Bench, to the Chancellor, is strictly expressed to this effect; "there are no words in the will which intimate any intention to limit over the respective

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shares of the two daughters dying without heirs of their bodies respectively ; on the contrary the limitation over is of the whole estate limited to all the daughters, and is to take place on the failure of all and every the daughter and daughters, and the heirs of their body and bodies, and the limitation over for default of such issue is to the heir at law ; consequently, we are of opinion, that as nothing is given to the heir at law whilst any of the issue remain, they must among themselves take cross-remainders." Most of the cases which have been decided to raise cross-remainders by implication, as was observed by the Court, have been in favour of the heir at law, and to prevent the estate going over to strangers. "Or any of them," leave the children of *Isabella* to wait till the death of both without issue. However it might stand on these words alone, according to the cases, 4 *Leon*, 14, and 1 *Vent.* 224, I do not say but here by the force of the words, on *his* or *her* death without legitimate heir of the body, the ultimate limitation is not to vest on the death of both devisees, but on his or her death. Here then was something to revert on the death of one of them ; all was not to go over at the same time. But even if it were doubtful, as is stated in *Comber v. Hill*, *Hardw. c. 22.* 2 *Str.* 969, by Lord HARDWICKE, cross-remainders are not to be presumed. No case can be cited where cross-remainders have been raised by the words in default of such issue, for they may be as well understood distributively as conjunctively, and the Court cannot raise cross-remainders by implication where words are indifferent one way or the other, and had the words been for default of such issue respectively, there would have been no colour of argument for cross-remainders. The devise there was, the whole premises to *Richard* his son for life, remainder, to his first and every other son and sons in tail male and for default of such issue to his grand-son *Richard Holden*, the son of *Thomas Holden*, and to *Elizabeth* his grand-daughter, equally to be divided, and to the heirs of their respective bodies, and for default of such issue to his grand-daughter *Ann Holden* in fee. The doubt arose on the words, for default of such issue. The Court said, we must see what goes before ; to my two grand-children *Richard* and *Elizabeth*, equally to be divided, and the heirs of their respective bodies. Now the word *respective* is what *such*, may very naturally refer to, and then it means, I give one-half to my grand-

son, and the other to my grand-daughter, and for default of such issue respectively, I give the same to *Ann*, i. e. the same respective part that the person dying was seised of; otherwise the word respective must be rejected; where as it stands in this will, it will have the same operation, as if the devises had been by separate clauses. Clearly the words in this will, are, in default of such issue respectively; if they die, or any one of them die without heir of the body, on his or her death, signify respective issue, respective deaths. The case in *Leonard*, is distinguished from this. There was the unnaturalness of giving the estate from his own children, and the word *whole* could not be used without raising cross-remainders. I have weighed again and again, every word in this will, and the codicils. I have endeavoured to give to every word its full operation. I do not take a word here, and a word there, on which to form my opinion, but I consider the whole scope; the original plan; the alterations; and all the objects of the testator's bounty. My mind has settled on this conclusion; that there is not such a necessary or satisfactory implication, that cross-remainders were intended by this testator, as to justify me in saying, that it was his intention to create them. I cannot adopt the construction of the defendant in error, of the words, and in case of no legitimate heirs of the bodies of the two legatees, or any one of them, that after his or her death, it shall revert to the heirs of *Isabella Simpson*; he read the clause as they do, in case of no legitimate heirs of the bodies of the two legatees, or in case of no legitimate heirs of the body of any one of them, then on the death of him or her who survives, the whole shall revert to my sister's children; because the testator has expressly stated alternative events on the happening of either of which, the remainder is to take effect; on the decease of both without legitimate heirs, the whole of the estate, on the death of any one of them without legitimate heirs, the parts of him or her so dying without heir of his or her body, it, that is, such parts, shall go over. But if I doubted of this construction, I would invoke the aid of the second codicil, the construction and explanation given by the testator. *Eleanor Hunt* or any other person is not to be permitted to waste my estate, as it reverts by my will and codicil, to my sister's children; for if the whole on her death, was to vest in *John Ledlie*, how could the trustees prevent him from committing waste. This injunc-

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tion on the trustees could never constitute an event which was to take place after an indefinite failure of issue, the extinction of unborn generations. The remainder over to *Isabella's* children, was to take effect on the death of either of them, if either of them died without issue, marks the time when the remainders over to her children take effect in possession, as in *Chadock v. Cowley*, *Cro. Jac.* 695. If *John Ledlie* had died without issue, leaving *Eleanor Hunt*, then *Eleanor Hunt*, would certainly have been entitled to the exclusive possession and enjoyment of this part of the estate, instead of the enjoyment and occupation of the room in the house, and the 12*l.* or 20*l.* at the discretion of the trustees. The devise is of real and personal estate. The personal estate then would certainly be in her power, so far as relates to the moiety coming to her, at the death of *John Ledlie*. The trustees would have no power to take possession of this moiety of the real or personal estate; they would have no power to prevent her from committing waste of it, or using it, directly in contradiction to the express declaration of the testator, that she should not have the use, or possession of any thing, except the pittance for her support, depending on her good behaviour; a bare subsistence, to use his own words. The devise then, taking the whole together, is of separate interests, to *John Ledlie*, and *Eleanor Hunt*, and the heirs of their bodies respectively, of such separate interests; creating estates tail in them respectively, and the respective heirs of their bodies, in these separate and respective estates; and if both of them die without such heirs, remainder over of the whole estate to *Isabella Simpson's* children, or if ere one of them die without such heirs, on his or her death, such separate and respective interest and estate, in like manner shall go over.

Although the law is as stated, that cross-remainders may be presumed between two, yet the presumption must be necessary, at least probable; but all this doctrine is now settled on principles of common sense; it is matter of intent to be collected from the whole will.

I am therefore of opinion, that cross-remainders cannot be implied but to *John Ledlie*, and *Eleanor Hunt*, and that the moiety devised by the will to *Eleanor Hunt*, on her death without issue, vested in the plaintiffs, and that judgment be reversed.

Judgment reversed.

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**SWEARINGEN'S executor against PENDLETON'S  
executrix.**

IN ERROR.

September.

WRIT of error to the Court of Common Pleas of Wash-  
ington county.

In the Court below, it was an action of covenant brought by *Ann Pendleton*, executrix of *Philip Pendleton*, deceased, against *Andrew Swearingen*, executor of *Van Swearingen*, deceased, on articles of agreement, dated *April 7th, 1785*, which recited that the parties were in possession of certain lands in *Virginia*, the legal title to which, being contested, it might be necessary that large sums of money should be expended to secure it to them. It was therefore agreed on the part of *Swearingen*, that he would bear an equal proportion of the expenses incurred, or which might be incurred by

A, and B, being in possession, as tenants in common, of land, the title to which was contested, and to secure which it might be necessary to expend considerable sums of money, entered into an agreement, by which B, covenanted to bear an equal proportion of the expenses incurred, or

which might be incurred by A, in vindicating their title, or extinguishing adverse claims. A, having had the legal title conveyed to himself alone, it was held, that he might maintain a suit for the recovery of B's moiety of the expense, without having previously conveyed to B, a moiety of the land; but as a court of chancery would compel A, to convey the legal estate, before he could be permitted to recover the money which B had agreed to pay, in contemplation of obtaining a legal title, a court of law in Pennsylvania, will stay the execution, until the legal estate in a moiety of the land be conveyed to B.

An executor is liable in respect to all the assets which come into his hands, whether they arise in the county in which letters testamentary are granted, in another county or state, or even in a foreign country; and if letters testamentary be granted in another state, as well as in this, a suit may be maintained here, before the settlement of any administration account in the other state.

If an executor, after the expiration of a year, apply the assets in his hands to the payment of legacies or distributive shares, to the prejudice of a creditor of whose claim he had no notice, it is a *devastavit*.

In an issue joined on the plea of *plene administravit*, which was found for the plaintiff, the jury besides finding against the defendant on the issue joined, found also that he had wasted the goods which came to his hands, and the Court below ordered judgment for the whole amount of damages and costs to be entered, *de bonis testatoris si, &c. et si non de bonis propriis* of the defendant. Held, that no issue being joined on the wasting of the testator's goods, what the jury found on that subject, was unauthorised, and that consequently the judgment was erroneous.

When the verdict is for the plaintiff, on a plea of *plene administravit*, the judgment for all but the costs, is *de bonis testatoris*. If, however, on such a judgment, a *ferri facis* be issued, it is the duty of the sheriff, unless goods of the testator be shewn by the defendant, to return a *devastavit*, which the defendant is estopped from denying, because the verdict is conclusive, that assets were in his hands at the commencement of the suit.

Where a writ of error is brought by the plaintiff, this Court may enter such a judgment, as ought to have been entered below; but where it is brought by the defendant, the judgment can only be reversed.

In some cases a judgment may be reversed in part, and affirmed in part; but in this case, to strike out that part of the judgment, which mentions the defendant's proper goods, and retain only that which relates to the goods of the testator, would be essentially to alter the judgment, and not to affirm a separate part of it.

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1818. *Pendleton*, in vindicating their title, or in extinguishing adverse claims. To accomplish these objects, it was alleged *Pittsburgh.* by the plaintiff, that considerable sums of money had been *SWEARINGEN* disbursed by her testator, for the recovery of which this suit *v.* *PENDLETON.* was brought.

The defendant pleaded covenants performed, and no breach on which issue was joined. He afterwards pleaded *plene administravit*, to which the plaintiff replied *assets in the hands of the executor, and that he hath not fully administered*, on which issue was also joined. On these issues, the cause was tried at *March* term, 1814, when the jury returned a verdict, in favour of the plaintiff, for the amount of *Philip Pendleton's* account, with interest on the several items at five per cent. The verdict concluded thus, "and the jury further do find, that *Andrew Swearingen*, esq. the defendant, executor of *Van Swearingen*, deceased, had assests in his hands sufficient for the payment of the aforesaid debt due to the estate of *Philip Pendleton*, deceased, and which ought to have been applied to the payment thereof, but that the said *Andrew*, hath wasted and misapplied the same assets."

At the trial, several points were made by the counsel for the defendant, and reserved by the Court.

1. The action being brought, to recover a moiety of the monies expended in acquiring the legal title to certain lands, and it appearing that *Philip Pendleton* had obtained a conveyance of the legal title to himself, it was contended, that before a suit could be brought to recover the portion of the purchase money with which *Van Swearingen's* representatives might be chargeable, a moiety of the legal estate ought to have been conveyed to them, by the representatives of *Pendleton*.

2. It was further contended, that the defendant, who had in the month of *January*, 1794, taken out letters testamentary, in *Virginia*, where *Van Swearingen* died, and where he had resided a considerable time previous to his death, and also in *Pennsylvania*, was not answerable in *Pennsylvania* for assets which might have come to his hands in *Virginia*, until his accounts should be settled there, which settlement, it was said, would be conclusive.

3. That the executor of *Van Swearingen*, not having received notice of this debt, it was lawful for him after the expiration of a year, to apply the assets to the payment of legacies or distributive shares; and that although he might require refunding bonds of the legatees or distributees, yet it was not necessary for his protection that he should take such bonds.

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4. It was also made a question, whether the judgment to be rendered upon the verdict, should be *de bonis testatoris si, &c. et si non de bonis propriis* of the executor, or simply *de bonis testatoris*.

The opinion of the Court on these several points, was delivered by the President; and as it received the sanction of the Court, except in relation to the last point, it is published at length. It was as follows.

“On the first point it has been urged, that *Philip Pendleton* ought to have caused the legal title which was purchased for the mutual benefit of himself and *Van Swearingen*, to have been conveyed to them both, as tenants in common, in place of having the property conveyed to himself; that by taking a title in his own name, he enabled himself (had he been so disposed) to defeat altogether the equitable right of *Van Swearingen* to a moiety of the land, by making sale of it to a purchaser for a valuable consideration without notice of the trust, and that it is unreasonable to compel the representatives of *Van Swearingen*, to pay for a legal title which they may never obtain.

“There can be no doubt, but that the representatives of *Van Swearingen*, have a right to obtain the legal title for a moiety of this land, so far as it was acquired by *Philip Pendleton*. The only question is, whether it be such a *pre-requisite* to the right to sue, that no suit could be sustained prior to such conveyance. Now the cause of action is the disbursement of the money, by *Philip Pendleton*, to procure the legal title. If this money was laid out pursuant to the agreement between the parties, *Pendleton* had a right, at any time, to call upon *Van Swearingen* for his proportion. Suppose the money had been paid by *Pendleton* to the person holding the legal title, under an agreement with such person to convey it, and real obstacles or perverseness should have delayed the con-



1818. *veyance, was Pendleton in such case bound to wait for Van Pittsburgh. Swearingen's moiety of the money, which he, Pendleton, had advanced for their mutual benefit until a conveyance could be enforced? It is conceived, he was not. The obtaining of a legal title then, to a moiety of the land, by the representations of Van Swearingen, seems not to be a pre-requisite to their liability to a suit.*

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Yet, where the legal title has been acquired by the person claiming to be reimbursed monies paid in the acquisition of it, equity seems to forbid his recovering the one, whilst he with-holds the other, and a court of chancery would probably compel the trustee to convey the legal estate before he would be permitted to receive the money which the other had agreed to pay in contemplation of obtaining a legal title. A Court in *Pennsylvania* has the power, and ought to do the same justice between the parties. Its process ought not to be permitted to be used to collect the monies by a plaintiff in such a case, till he has done what equity requires towards the defendant. It therefore appears to be right that this Court should stay execution, till the legal estate in a moiety be conveyed to the representatives of *Van Swearingen*.

In respect to the second point, the same opinion which was intimated at the trial, is still retained. The executor is liable in respect to *all the assets which came to his hands*, whether they arise in the county where the letters testamentary are granted, or elsewhere, as in another state, or even a foreign country; and this principle is well established. In *Dowdale's case*, 6 Co. 46, b. Cro. Jac. 55. the defendant in an action of debt brought against him, as executor of *Lang*, pleaded *plene administravit*, and issue upon assets. The jury found, that the testator died *infra regnum Hiberniæ*, and the defendant, after the testator's death, divers of the testator's goods, within the *realm of Ireland*, took and administered, to the value of the debt, and that the defendant, *nulla alia sive plura bona quæ fuere predicti testatoris, post mortem testatoris infra regnum Angliæ, unquam administravit, et si, &c.* And it was objected that a jury cannot find a thing although it be transitory, done in another realm. But it was resolved by the Court, that the "jurors have found the *substance* of the issue, that is to say, *assets*; and the finding that they are beyond sea, is surplusage; for if the executors have any goods of the testator's in any part of the world, they shall be

charged in respect to them; for many merchants and other men who have great stock, and goods to a great value beyond sea, are indebted here in *England*, and God forbid that these goods should not be liable to their debts, for otherwise these would be a great defect in the law." As to the settlement of the account in *Virginia*, the creditor was no more bound to wait for that, than he would be to wait for the settlement of the account in *Pennsylvania*.

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"In relation to the third point, there are four several ways in which an executor may be charged *de bonis propriis*. 1st. By the return of the sheriff, as where, upon an execution commanding the sheriff to levy the debt *de bonis testatoris*, he returns *nulla bona testatoris*, and that the defendant (the executor,) hath wasted the goods. In such case the plaintiff may sue out an execution *de bonis propriis* of the executor, such return of the sheriff not being traversable; the defendant, in case it were false, had no remedy but a suit against the sheriff. This *Bohun (Inst. Leg. 255.)* observes, was the old mode of proceeding. But the sheriff being afterwards sued, for making such return, as being false, another method was adopted, more safe indeed for the sheriff, but more chargeable and tedious to the party. This I shall notice as the second mode; by an inquest of office, where the sheriff had made a return of *nulla bona testatoris* on the first *feri facias*, a suggestion was made on the roll, that the defendant had wasted the goods; whereupon, a special *feri facias* issued *scilicet*, that the sheriff levy the debt of the goods of the deceased, *et si sibi constare potuit*, that the executors have wasted the goods, then *de bonis propriis* of the executors; upon which execution, it will be the duty of the sheriff to take an inquisition, and if it be found by the inquest, that the goods of the testator to the value of the debt were wasted by the executors, and this be returned on the writ, a *scire facias*, will issue against the defendants, to shew cause why execution should not be awarded of their own proper goods and chattels. The defendants, however, may traverse the *devastavit* found by the inquest; and although the original judgment be against them, by default or confession, yet they may appear to the *scire facias* and plead *plene administraverunt, absque hoc quod devastaverunt*, which amounts to no more than a general *plene administravit*, which they might have pleaded the first time. Hence this mode of proceeding was consider-

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1818. *Pittsburgh.* ed so tedious and troublesome, that it has been observed, a plaintiff had better lose a small debt, than proceed thus against an executor who means to be troublesome. *Boh. Ins. Swearingen v. Penbleton.* Leg. 255.

The third way of charging an executor *de bonis propriis* after obtaining a judgment *de bonis testatoris*, is by bringing an action of debt on the first judgment, and suggesting a *devastavit*, and to such action he cannot plead any thing in bar which he might have pleaded to the original action. As if the original judgment had been obtained by confession or default, the defendant cannot plead *plene administravit*, because a judgment, by confession or default, is an admission of assets to the amount of the plaintiff's demand; and the defendant is estopped to allege the contrary.

"A fourth mode in which an executor may be charged, is by his own pleading; as where he has rendered himself liable by pleading a matter, which would be a perpetual bar, which lies within his own knowledge, and is false. In such case judgment shall be entered *de bonis testatoris si, &c. et si non de bonis propriis* of the executor; as if he pleads *ne unques executor*, or that he *renounced*, and *nulla bona deveniunt ad manus*. And upon a judgment thus obtained, where an executor so charges himself, though the first execution must be *de bonis testatoris*, yet the sheriff cannot return *nulla bona testatores*, simply, but must also return a *devastavit*. *Cro. Eliz.* 102.

"If defendant pleads *administravit*, plaintiff may pray judgment, *quando acciderint*; but if he takes issue on the plea, and it be found against him, there shall be judgment *quod querens nil capiat, &c.* If the verdict be against the defendant on this plea, it is necessary that the jury should find the amount of the assets; for which alone the plaintiff shall obtain judgment. It is necessary too, that the plaintiff should have proved the amount of his claim, for though the plea admits the debt, it does not admit the amount of it. *Ib.*

"Whether the executor had, or had not, notice of this claim, is not material. Although he might have had notice of it, still the exhausting of the assets, even after the expiration of a year, in the payment of legacies, or distributive shares, in prejudice of a creditor, (without requiring refunding bonds of the legatees or distributees,) would amount to a *devastavit*.

"In the case under consideration, the jury have found the amount of the plaintiff's claim, and that the defendant had assets to the amount which ought to have been applied in satisfaction of it; but that he had wasted them. 1818. *Pittsburgh*. *SWEARINGEN* *v.* *PENDLETON*."

"We are therefore of opinion, that judgment be entered for the plaintiff, agreeably to the verdict, *de bonis testatoris si, &c. et si non de bonis propriis*, of the executor. Execution to stay, until the legal estate, so far as it was vested in *Philip Pendleton*, held in trust for the use of *Van Swearingen*, be conveyed to the use of his representatives."

The cause was argued in this Court, on the grounds stated above, by *Ross*, for the plaintiff in error, who cited 6 *Bac. Ab.* 304. (old edit.) *Goadisson v. Nunn.*(a) *Howlet v. Strickland.*(b) *Jones v. Barkley.*(c) *Duke of St. Albans v. Shore.*(d) 2 *Bac. Ab.* 399. *Swinb.* 396, 7. *Dean and Chapter of Bristol v. Guyse.*(e) *Cro. Car.* 286. 6 *Bac. Ab.* 545. *Erving v. Peters.*(f) And by

*Campbell*, for the defendant in error. He cited *McColough v. Young.*(g) *Græme v. Harris.*(h) *Jacobs's Law Dictionary*, *Devastavit*, *Swinb.* 393. *Chapman v. Gale.*(i) ——— (k) *Pettifan's case.*(l) 2 *Vin.* 312, 313, 314, 315. *Braxton v. Winslow.*(m) *Gordon's Administrators v. Justices of Frederick.*(n) *Mary Shipley's case.*(o) *Gibson v. Brook.*(p) *Tid. Pr.* 933, 4, 5, 6. *Clements v. Waller.*(q) *Cuming v. Sibby.*(r) *Parker v. Harris.*(s) *Frederick v. Lookup.*(t) *Henriques v. Dutch West India Company.*(u) *Lill. Ent.* 233. *Bellew v. Aylmer.*(v) 2 *Bac. Ab.* 288, 289.

The opinion of the Court was delivered by

**TILGHMAN C. J.** Not perceiving any error in this record but in one point, my observations will be confined to that point only. Issue was joined on the plea of *plene administravit*, which was found against the defendant. It was the

(a) 4 *T. R.* 761.

(b) *Cowp.* 56.

(c) *Doug.* 684.

(d) 1 *H. Blac.* 270.

(e) 1 *Saund.* 112.

(f) 3 *T. R.* 688.

(g) 1 *Binn.* 63.

(h) 1 *Dall.* 456.

(i) 2 *Lev.* 22.

(k) *Kirby*, 270.

(l) *Cro. Rep.* 32, 33.

(m) 1 *Wash. Rep.* 31.

(n) 1 *Munf.* 9, 10.

(o) 3 *Co.* 266.

(p) *Cro. Eliz.* 886.

(q) 4 *Burr.* 2156.

(r) 4 *Burr.* 2490.

(s) 1 *Salk.* 262.

(t) 4 *Burr.* 2018.

(u) 2 *Str.* 208. 2 *Ld. Raym.* 1532. *S. C.*

(v) 1 *Str.* 188.

1818. opinion of the Court of Common Pleas, that judgment should be entered, for the *whole amount of damages, and costs, de bonis testatoris si, &c. et si non de bonis propriis*, of the defendant. The reason assigned for this judgment is, that the jury, besides finding against the defendant on the issue joined, found also, that he had wasted the goods which had come to his hands. No issue was joined on the wasting of the goods of the testator, by the defendant, and therefore, whatever the jury found on that subject, was unauthorised. It was surplusage, and not to be regarded. In considering, therefore, what the judgment ought to have been, we must throw the wasting of the goods out of the question. It is simply a verdict for the plaintiff, then, upon the plea of *plene administravit*. What judgment does the law authorise in such case? I find it positively laid down in the year book 11. H. 4. p. 5. that the judgment for all but the costs, is to be *of the goods of the testator*. This case is cited in 11 Vin. 386. The same principle was recognised, in *Mary Shipley's* case, 8 Co. 134, and may be traced without contradiction, in various decisions and opinions of Judges from that time to the present. It is true, that supposing the proper judgment to have been entered, and a *feri facias* issued, it would have been the duty of the sheriff, unless goods of the testator had been shewn by the defendant, to return a *devastavit*, which the defendant would have been estopped from denying, because the verdict was conclusive, that assets were in his hands at the commencement of the suit. It is to be regretted therefore, that we have it not in our power to enter the proper judgment. But the law is settled. Where the writ of error is brought by the plaintiff, we may enter such judgment here, as ought to have been entered below; but where the defendant brings the writ of error, we can only reverse the judgment. It sometimes happens, indeed, that a judgment may be reversed in part, and affirmed in part; as where the judgment is good for the debt, but bad for the costs; such were the cases of *Cummins v. Sibley*, 4 Burr. 2489, and *Frederick v. Lookup*, 4 Burr. 2018. And here, the plaintiff in error wished us to strike out all that part of the judgment, which mentioned the *defendant's proper goods*, and retain only the first words, *de bonis testatoris*, but that would be amending the judgment, and not affirming a separate part of it. To stop at the words *de bonis testatoris*, and cut off

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the rest of the sentence, would be to alter the judgment essentially; for it was not intended by the Court who rendered it, to limit any part of it to the goods of the testator. The condition, that if no goods of the testator could be found, the proper goods of the defendant were to be levied on, pervades the whole.

I am therefore of opinion that the judgment should be reversed.

Judgment reversed.

BAIRD indorsee of M'DONNELL *against* COCHRAN and DOWLING.

IN ERROR.

Monday,  
September 14.

THIS suit was brought in the Court of Common Pleas of Allegheny county, by the plaintiff in error, as the indorsee of a promissory note drawn by Dowling, in the name of the firm of Cochran and Dowling, payable at sixty days, without defalcation, to John M'Donnell or order, by whom it was indorsed in blank. The process was served on Cochran alone, Dowling having left the county before it was issued. The hand-writing of Dowling the drawer, and of M'Donnell the indorser, were proved, and the partnership of Cochran and Dowling admitted by the defendant, who produced the articles of co-partnership, from which it appeared, that the partners were not authorised to charge each other by drawing notes in the name of the firm. The defendant then offered M'Donnell as a witness to prove, that the note was given, not for a partnership but for a private debt, and at the same time offered his books in proof of that fact. To this testimony, the defendants' counsel objected, but the Court over-ruled the objection, and the evidence was received. On his examination the witness declared, that he was interested in the event of the suit, having promised to indemnify the indorsee, in case he should not recover of the

The rule which precludes a man from giving evidence to destroy a paper to which he has given credit by affixing his name, is confined to commercial negotiable instruments, actually negotiated in the usual course of business. A witness in a civil suit may be compelled to give evidence which may affect his interest, provided, it does not tend to convict him of a crime, or subject him to a penalty. One partner cannot bind his co-partner by giving a note in the name of the firm for his own private debt.

1818. drawers. He further declared, that the note was assigned some time after it became due.

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In the books of *M'Donnell* there appeared no account whatever, either against *Cochran* or against the firm of *Cochran* and *Dowling*; but there was an account against *Dowling* alone, for groceries and other articles obviously for the use of his family; and for the amount of this private account *Dowling* had given the note in question.

In the course of his charge the President of the Court told the jury, that if *Dowling* had given this note in a partnership transaction in the name of the firm, both parties would have been bound by it, notwithstanding any private agreement between themselves, that one partner should not have power to charge the other, by drawing notes in the name of the firm; but as this note had been given, not for a partnership debt, but for a private debt, the plaintiff could not recover against *Cochran*.

To this opinion the plaintiff's counsel excepted.

*M'Donald*, for the plaintiff in error, cited *Manning v. Wheatland*. (a) *Warren v. Merry*. (b) *Coleman v. Wise*. (c) *Smede's executors v. Etmendorf*. (d) *Woodhull v. Holmes*. (e) *Peake's Ev. (Randall's)*, 160. 187, 188. *Bayard's Ev.* 111. 113, 119.

*Baldwin*, for the defendant in error, cited *Holme v. Karsper*. (f) *Evans v. Smith*. (g) *Baker v. Arnold*. (h) *Livingston v. Roosevelt*. (i) *Chitty on Bills*, 141. 144. *Jackson v. Rumsey*. (j) *Trustees of Lansingburg v. Willard*. (k)

The opinion of the Court was delivered by

TILGHMAN C. J. On the trial of this cause, the plaintiff having proved the execution of the promissory note on which his action was founded, and the hand-writing of *M'Donnell*, the payee, by whom it was indorsed, the defendant offered

(a) 10 *Mass. Rep.* 502.  
(b) 3 *Mass. Rep.* 27.  
(c) 2 *Johns. Rep.* 165.  
(d) 3 *Johns. Rep.* 185.  
(e) 10 *Johns. Rep.* 231.  
(f) 5 *Binn.* 471.

(g) 4 *Binn.* 368.  
(h) 1 *Caines*, 253. 270. 273. 274.  
(i) 4 *Johns. Rep.* 261. 279.  
(j) 3 *Johns. Cas.* 234.  
(k) 8 *Johns. Rep.* 423.

the said *M<sup>c</sup>Donnell* as a witness to prove, that the consideration of the note was a private debt due to the said *M<sup>c</sup>Donnell* from *Richard K. Dowling* one of the defendants, who had signed the note with the name of the firm of *Cochran and Dowling*. The plaintiff objected to the competency of the witness, but the Court admitted his testimony, to which the counsel for the plaintiff excepted. It was the interest of the witness, that the plaintiff should recover. The plaintiff therefore could have no reason to object to his testimony, except that, by indorsing the note he had given credit to the paper which his evidence was intended to destroy. In what cases a man's putting his hand to a paper, shall preclude him from giving testimony to destroy it, has been heretofore fully considered and decided by this Court, in *Baring v. Shippen*, 2 *Binn.* 154. The exclusion is confined to commercial negotiable instruments, such as promissory notes and bills of exchange, which pass and are circulated by indorsement, and sometimes by bare delivery. But it is not sufficient, that the instrument should be *negotiable*, it must also be *negotiated in the usual course of business*. A note not negotiated until the day of payment is past, (as was the case in the present instance,) is out of the usual course of business. It carries dishonour on the face of it; the man who takes it, ought to inquire why it was not duly paid; and having taken it under suspicious circumstances, he stands in the situation of the person who was holder at the time it was due. The indorsement transfers a right of action to the indorsee, in the same manner as the assignment of a bond under our act of assembly, passes a right of action to the assignee; but the indorsor in the one case, and the assignor in the other, are competent witnesses to prove the illegal consideration of the writing to which they have put their names. But another objection is made to *M<sup>c</sup>Donnell's* evidence. Granting, says the plaintiff, that he was a competent witness in case he had chosen to give his testimony, yet he objected, and the Court had no right to compel him to testify against his interest. To this the counsel for the defendant answer, that the witness's being compelled to answer, was a matter between him and the Court, which did not affect his competency, with which the plaintiff has nothing to do, and which therefore he cannot assign for error. There is considerable weight in this answer, but without deciding on it, the Court think it

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better to determine the main question, whether a witness may be compelled to give evidence which may affect his interest. It is a question of considerable importance, which often occurs, has never been decided by this Court, and is now open to consideration, on principle. From the nature of society it would seem, that every man is bound to declare the truth, when called upon in a court of justice, except the disclosure will tend to convict him of some crime, or render him subject to some penalty. In such cases, the preservation of liberty requires, that a man should not be compelled to accuse himself. Perhaps too, there may be cases, where he shall not be obliged to give evidence of a matter which may degrade him in the public opinion, though it be not punishable by law. With these exceptions, every man may be compelled on a bill filed against him in equity, to declare the truth, although it affects his interest. Why then should he not be compelled at law, except where he is a party to the suit? The Court in which he is examined, will take care to protect him from questions put through impertinent curiosity, and confine his evidence to those points which are really material to the question in litigation. So far, his neighbour has an interest in his testimony, and no farther ought he to be questioned. The party to a suit, may object to a witness who is called to prove a thing which promotes his own interest; because in such case his veracity may be suspected; but no objection lies, if he swears against his interest. In the case before us, the witness was called to testify against his interest; there was no objection, therefore, in point of integrity. The plaintiff, against whom he was called, would not be permitted to object. All the objection is on the part of the witness, who claims to be exempted from testifying, as a personal privilege. Our constitution protects him no further than, in not being obliged to *accuse* himself, which plainly refers to something criminal, penal, or infamous, and not barely to matter of interest. There is no act of assembly to protect him. Neither is he protected by considerations drawn from general policy and the good of society. On the contrary, the general welfare will be best promoted, by considering the disclosure of truth as a debt which every man owes to his neighbour, which he is bound to pay when called on, and which in his turn he is entitled to receive. We are, therefore, of opinion, that the Court of Common Pleas, did not ex-

ceed their authority, when they compelled *John M'Donnell* 1818.  
to testify in this cause.

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Exception was also taken by the plaintiff, to the charge of the Court. The substance of the charge was, that one partner cannot bind another, by giving a note in the partnership name, for his own private debt. In this, certainly there was no error. We are therefore of opinion, that the judgment should be affirmed.

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Judgment affirmed.

### BEDFORD *against* SHILLING and others.

IN ERROR.

*Monday,*  
*September 14.*

THIS was an action of ejectment for land lying west of the river *Allegheny*, in the county of *Mercer*. The plaintiff claimed under a warrant and patent; and the title of the defendants was founded on actual settlement. The plaintiff gave in evidence a warrant, survey and patent, including the land claimed by him, and it was admitted, that the defendants were in possession; *John Thompson*, one of the defendants, under whom the others claimed, having taken possession and commenced a settlement in the year 1796. No evidence was given by the plaintiff, of any particular acts done by himself or his agents towards making a settlement, or of any particular circumstances by which he or his agents were prevented from making or attempting to make one. By an act passed *March 14th*, 1814, entitled, "An act explanatory of an act, entitled, An act for the sale of vacant land within this Commonwealth," it is enacted, "that before any person claiming land north and west of the rivers *Ohio* and *Allegheny* and *Conewango* creek, by virtue of a warrant, shall recover against an actual settler or his representative, who may have made or commenced an actual settlement on the tract of land claimed by the said warrantee or his representative, the said warrantee or his representative shall prove to the satisfaction of the Court and jury or arbitrators, that the said warrantee, or some person for him, did, within two years

The act of 14th March, 1814, explanatory of the "Act for the sale of vacant land within this Commonwealth," does not extend to suits commenced before its passage.  
Query, whether the act embraces the case of a patentee?

1818. from the date of his or their warrant, go on the land claimed, or attempted to go, and that he or such person was individually prevented by the enemies of the *United States*, from settling said lands, and that he or such person did persist during two years from the date of his or their warrant to settle and improve the same, or cause the same to be done, and shew circumstantially what attempts, and what acts of persistence were made," &c. "Provided, That in all cases where a warrantee or his legal representative shall, within two years from and after the first day of *April* next, tender a conveyance for one hundred and fifty acres, with the usual allowance, including his improvement, clear of all expense, agreeably to the act, entitled, 'An act providing for the settlement of certain disputed titles to land north and west of the rivers *Ohio* and *Allegheny*, and *Conewango* creek,' passed the twentieth day of *March*, one thousand eight hundred and eleven, and the said settler shall refuse to accept of the same, in all such cases, the actual settler, or those claiming under him, shall receive no benefit from the provisions of this act, &c." This act was passed *after the commencement of the suit*, which was brought to *February* Term, 1814. The Court of Common Pleas charged the jury, that it was a bar to the plaintiff's recovery, and a verdict was accordingly found for the defendants. The plaintiff took a writ of error.

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On the removal of the cause to this Court, it was argued by *Baldwin*, for the plaintiff in error, who contended,

1. That the act of 14th *March*, 1814, did not embrace the case of a patent, or of a suit brought prior to the passage of the law. To this point, he cited, *Helmore v. Shuter.*(a) *Couch v. Jefferies.*(b) *Ogden v. Blackledge.*(c) *Dash v. Van Kleeck.*(d) *Calder v. Bull.*(e) *Jones's lessee v. Anderson.*(f) *Fletcher v. Peck.*(g)

2. That the act was unconstitutional and void; to establish which, he cited *Austin v. Trustees of University.*(h) *Vanhorne's lessee v. Dorrance.*(i) *Marbury v. Madison.*(k)

(a) 2 *Show.* 17.

(b) 4 *Burr.* 2460.

(c) 2 *Cranch*, 273.

(d) 7 *Johns. Rep.* 477.

(e) 3 *Dall.* 388.

(f) 4 *Yeates*, 569.

(g) 6 *Cranch*, 133.

(h) 1 *Yeates*, 260.

(i) 2 *Dall.* 304.

(k) 1 *Cranch*, 174.

*Hunter v. Fairfax.*(a) *Jones v. The Commonwealth.*(b) 1818.

*Ham v. M'Claws.*(c) *Emerick v. Harris.*(d) Pittsburgh.

*Wilkins*, for the defendants in error, cited *Stoddart v. Smith.*(e) *The Commonwealth v. Duquet.*(f)

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TILGHMAN C. J. The provisions of the act of 14th March, 1814, placed the plaintiff on very different ground from that on which he stood when he commenced his action; because it had been decided, that under the act "for the sale of vacant lands within this Commonwealth," passed the 3d April, 1792, it was not necessary to prove, that a warrantee was individually prevented from making a settlement; it was sufficient to prove, that the danger from the Indians at war with the United States, was such, as to deter any prudent man from attempting a settlement, prior to General Wayne's treaty made at Fort Grenville, in the month of December, 1797.

The question will be then, whether this explanatory act of assembly extends to suits commenced before its passage. And that it does not, I am clearly of opinion, because nothing less than positive expressions would warrant the Court in giving a construction which would work manifest injustice. It must not be supposed, that the legislature meant to do injustice, and what but injustice would it be, to subject a man to the loss of his action, and the costs of suit, by a retrospective law, although at the time when he commenced his suit, he was entitled by the established law, to recover? This is not a new question. It has several times happened, that acts of assembly have been made, prohibiting suits of a particular nature, and that suits of that nature were depending when the acts were passed. I have always declared my opinion, that such suits were not within the acts; and for this, I refer to the cases of *The Commonwealth v. Duane*, 1 Binn. 601. *Moore* (in error) *v. Houston*, 3 Serg. & Rawle, 169, and *Duffield v. Smith*, decided at Philadelphia, 3 Serg. & Rawle, 590. The same rule of construction was adopted by the Court of King's Bench in England, in the case of *Couch v. Jefferies*, 4 Burr. 2460, by the Supreme Court of the United States, in *Ogden v. Blackledge*,

(a) 4 Munf. 1.

(b) 1 Call. 577.

(c) 1 Bay. 93.

(d) 1 Binn. 416.

(e) 5 Binn. 355.

(f) 2 Yeates, 498.

1818. 2 *Cranch*, 272, and by the Supreme Court of *New York*, in *Pittsburgh*. *Dash v. Van Kleeck*, 7 *Johns*. 477; and indeed it is so conformable to the plain principles of justice, that were there no authorities, I should not hesitate to be governed by it. Now so far have the legislature been from *expressly* declaring an intention to extend this act to suits then depending, that a contrary intent may be deduced by reason irresistible. I have already cited that part of the act which prescribes the evidence, without which the person claiming under a warrant shall not *recover*. The word *recover* may, without violence, be confined to suits *commenced after the act*; but a provision in the subsequent part of the act, shews decisively, that such was the meaning. I allude to the proviso, "that in case a warrantee shall, within two years from the 1st *April*, 1814, tender a conveyance of 150 acres, with the usual allowances, including his improvement, clear of all expense, and the settler shall refuse to accept of the same, in such case the said settler, or those claiming under him, shall receive no benefit from this act." This tender ought to be made before the commencement of the suit, otherwise injustice would be done to the settler, who had a right to defend himself under this law, as the case stood at the commencement of the suit. The intent of the act being, then, to give the warrantee an opportunity of recovering, by tendering a conveyance of 150 acres before he commenced his suit, it cannot extend to suits depending when the act was passed, because in those cases such previous tender would be impossible. Whether we consider this case, then, upon the intention deducible from the words of the act, or upon principles of construction too strong to be shaken, I am of opinion, that the Court of Common Pleas was mistaken in charging the jury, that the plaintiff was barred from recovering. The judgment must therefore be reversed, and a *venire facias de novo* awarded.

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and others.

GIBSON J. It is not absolutely necessary to express an opinion on the constitutional question, and I therefore decline it. To step out of our way to encounter a matter of this sort, were we ever so well convinced of the unconstitutionality of the act, would, I apprehend, evince a culpable want of respect for a co-ordinate branch of the government. It is of no consideration that the question will shortly arise, as it is said by counsel, on other acts of assembly, when this

court will be bound to pronounce on it. When it does so arise, it will be met with due deference, as well to the legislature, as to a conscientious discharge of our own official duty; but until then, propriety forbids a decision. Neither do I think it requisite to decide whether the case of a patentee be within the act of 1814, or not. That is a question about which I may be permitted to say, I entertain doubts; the consideration of which demands more time than I can at present bestow; and from the great length of time this cause has been pending in this Court, justice requires it should be decided at the present term.

The legislature, I am well persuaded, never intended the act in question should be applied to suits brought before it was passed. I cannot impute to them, a deliberate intention to do injustice. By the proviso, it is clear the legislature viewed the right of the warrantee as the law then stood, or at least under the construction then prevailing, as perfect and complete. The whole act would seem to have been predicated on that notion. Could it then be any thing but rank injustice, to compel a plaintiff, prosecuting those rights, which the law recognised as affording a good cause of action, to desist, pay costs, and begin again, when those costs were incurred at a time when he was in no default. But the case of a claim that would be barred by the statute of limitations, is decisive. Suppose an adverse possession for twenty-one years before the passing of the act; the plaintiff cannot go on with the suit depending, not having tendered a deed for a part of the land, before bringing his action, at which time he never could have foretold, that it would be made a pre-requisite; he cannot discontinue his suit, perform the new conditions, and begin again; for the statute of limitations intervenes, and cuts him out, and thus, by the doctrine contended for, he loses his land entirely. It is true, that in this case, the adverse possession commenced in 1796, and that therefore the plaintiff might have commenced a second action, after having made the conveyance required, and thus have complied with the act, without being affected by the statute of limitations. But in giving a construction to a statute, we must establish a general rule, equally applicable in all cases. We are fully warranted in, giving this construction, by the cases cited; it is one which the Courts of this state have uniformly adopted, and it has been held, almost against the ex-

1816.

Pittsburgh.

Benson

v.  
Smellie  
and others.

1818.  
*Pittsburgh.*

*BRADFORD*  
*v.*  
*SMILLINE*  
and others.

press provisions of a statute, in a country where legislation is uncontrolled by any constitutional check. It seems clear to me, the legislature never, in fact, intended this act to be applied to actions depending. It pre-supposes the existence of a power in the plaintiff to comply with its requisitions, before a suit be brought. If the legislature had intended, that the progress of actions then existing, should be arrested, they ought to have said so; they *would* have said so. On this ground, I think the judgment should be reversed.

DUNCAN J. This ejectment was brought to the term of *February*, 1814, and was tried in *November*, 1814. The lands lie north and west of the rivers *Ohio* and *Allegheny*, and *Conewango* creek. The plaintiff gave in evidence, a warrant in the name of *J. Rea*, for 400 acres, dated 18th *March*, 1794; a survey thereon, of *March*, 1795; and a patent to himself, dated 18th *May*, 1808.

It was admitted by the defendants, that one of them, *John Thompson*, under whom all claim, settled within the lines of this survey in 1796, and that he and they have ever since continued in possession. It was further admitted, that *John Thompson* had obtained a vacating warrant, and a patent, dated 11th *August*, 1807; and the court gave it in charge to the jury, that the act of assembly, passed 14th *March*, 1814, was a bar to the plaintiff's recovery. This opinion is excepted to, and the question now to be decided by this Court, is on the bar arising on the act of assembly.

On the part of the plaintiff, it is contended: 1st, That the act does not extend to this case, inasmuch as the plaintiff claims not on a warrant, but derives his title from a higher source, a warrant consummated by a patent; a contract, not executory, but executed.

2d. That it extends not to suits theretofore commenced, and then pending.

3d. That if it did so extend, it is an act, unconstitutional, and void.

The Court decide, that the act of 1814, is of itself, a flat bar to the plaintiff's recovery; it is a bar *per se*, unless he prove certain facts. According to the law, as it stood when he commenced his action, it was not incumbent on him to prove these facts; other facts had been deemed and judged to amount either to a performance, or a suspension of the con-

ditions on which his warrant had been granted. An individual prevention by the enemies of the *United States* was not required ; the just terror of savage hostilities, depredations of the Indians, the terror that might fall *virum constantem* under the proviso of the act of 3d *April*, 1792, had been settled to excuse the non-performance of an act rendered highly dangerous, if not absolutely impracticable, by imperious circumstances over which the party had no controul ; not a personal interruption by a savage foe ; not a wanton exposure to danger, or a sacrifice of lives ; and though the condition of actual settlement, improvement, and residence, had not been absolutely dispensed with, the forfeiture was suspended ; and when the real terror from the enemy had subsided, the party should still honestly persist in his endeavours. But other preventions than those of enemies, had been held to dispense with the condition ; for it had been settled, that if a person, under the pretence of an actual settlement, should seat himself on lands previously warranted and surveyed, within the period allowed under a fair construction of the law to the warrantee, for making his settlement, and withhold the possession, and obstruct him from making his settlement, he should derive no benefit from such unlawful act. These principles were settled by the Supreme Court at *Sunbury*, under the act of 3d *April*, 1792, entitled, " An act to settle the controversy arising from contending claims to lands within this territory," in an issue to which the state was a party. The very matter was put in issue, in order to settle the controversy, and establish a judicial construction of the act of *April*, 1792. 4 *Dall.* 237. 2 *Smith*, 219. *Attorney General v. The Grantees*. The plaintiff, after this decision, obtained his patent.

This act of *March*, 1814, has been endeavoured to be supported by the counsel for defendants in error, as an explanatory law ; if it be so, it cannot be expounded by any strained construction, but must operate according to its express letter, since otherwise, if any construction could be made against the express letter of the exposition made by the legislature, there would be no end of expounding. *Powell on Dev.* 129. Explanatory acts are to be construed only according to their words, and not with any equity or intendment, for if a construction should be made against the express letter of the exposition, exposition would be endless. The Court cannot

1818.  
Pittsburgh.  
HARDON  
v.  
SETTLING  
and others.



1818. vary the explanation further than is expressed in the statute.  
Pittsburgh. 3 Co. 35. *Carth.* 396. This act certainly introduces a new  
Barnes rule of evidence, and of law, and ought not to have a retro-  
v. spective operation in other cases than where declared in the  
Swilling most unequivocal manner. *Dash v. Van Kleeck*, 7 *Johns.* 497.  
and others. The letter of this act does not include the patentee "before  
any person claiming by virtue of a warrant." Now the plain-  
tiff claims, not only under a warrant, but something more.  
The warrant and survey are the inception of the legal title,  
and are considered as to many, yet not as to every purpose  
as the legal title. The warrant is but an executory contract  
with the state; it is a contract executed by the patent. A  
line of distinction is drawn by the Court in *The Attorney General*  
*v. The Grantees*, between persons holding under war-  
rants, and by virtue of patents; for a patentee, as is there  
held, led into error, and lulled into confidence by his patent  
that the conditions had been legally complied with, and there-  
fore had remitted his endeavours therein, might be entitled  
to relief in equity. To this may be added, that the patentee  
has taken out his patent on the faith of this decision, at  
some expense.

The judges drew up their opinions with just caution, sub-  
ject to the provision in the 9th sect. of the act of *April, 1792*;  
an act, declaring, that every man claiming by virtue of a  
warrant, should make entry, and bring his ejectment with-  
in seven years, or should be barred from recovery. By no  
just construction could this be held to extend to persons claim-  
ing by virtue of a patent; for the plaintiff in ejectment need  
not introduce his warrant; his patent is *prima facie* evidence.  
As this act cannot be extended beyond its letter; cannot  
be taken by intendment, to include titles not included by  
name; and as the present plaintiff claims, not by virtue of a  
warrant alone, but under a warrant, and survey, and patent,  
this act does not interpose, as a bar to prevent his reco-  
very. Does the act extend to all cases, and prevent a reco-  
very in suits commenced before its passage? "before any  
persons claiming by virtue of a warrant, shall recover."  
Admitting the constitutional power to legislate retrospectively  
on contracts founded on prior legislative grants, does this  
act so retrospect on suits commenced? The first principle in  
legislation is, that all laws are to commence *in futuro*. No-

thing but the most unequivocal expressions can justify a retrospective operation. Let us illustrate this by judicial decisions, on the construction given to the statute of frauds, 29 *Car. 2*. It enacts, that from and after the 24th *June*, no action shall be brought, to charge any person upon an agreement, without note in writing. There was a parol promise of marriage, prior to the statute; it was determined in *Gilmore v. Shuter*, *T. Jones's R.* 108. 2 *Show.* 17. 2 *Mod.* 310, that notwithstanding these imperative words, after that day, an action would lie; for that a construction ought not to take effect, destroying existing rights, prior to the passage of the law, and that the statute only extended to promises made after that day. Now the words are equal, "shall bring no action"—"before any person claiming by virtue of warrant, shall recover." Unrestrained as the British legislature is, by any written constitution; and notwithstanding the boasted omnipotence of the parliament, such there has been the construction. So in 1 *Ld. Raym.* 1352, and in *Couch v. Jeffries*, 4 *Burr.* 2460, which was an action for a penalty, and a verdict obtained by the plaintiff; motion to stay judgment, on the ground of payment of the duties having been made into the stamp office, before the 1st *September*, 1769, under an act of parliament, which says, if the duties before neglected to be paid, shall be paid in, on or before 1st *September*, 1769, the person who has incurred the penalties, shall be discharged of and from the said penalties. The question was, whether the act related to actions brought before. It was decided by the Court, that it did not, and it was said by *Ld. Mansfield*, here is a right vested, and it is not to be imagined, that the legislature could, by *general words*, mean to take it away from the person in whom it was vested, and who had been at costs in prosecuting it. They certainly mean future actions. It never can be the true construction of this act, to take away this vested right, and punish the innocent pursuer of it with costs. So here, the plaintiff, if he does not recover, must by this judgment, not only lose his own costs, but pay the defendant his. The right of the plaintiff, to recover under the law as it was settled when he brought his action, was a vested right; a right of recovery. The Court admits this, but withdraws it from the jury, on the supposed bar created by the act of *March*, 1814.

We will proceed to test this judgment of the Court, by  
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*Pittsburgh.*

BEDFORD

v.

SHILLING  
and others.

1818. decisions more applicable to our own government, viz. *Livingston v. Livingston*, 2 *Caines*, 300. It would require express words to take away a party's existing rights. 1 *Wash.* 139, *Turner v. Turner*, Detinue for the recovery of two slaves, brought in 1783. Plaintiff offered in evidence, a parol gift of these slaves. This was admitted, and exceptions taken, and in the Court of Appeals, the judgment was reversed; the gift being subsequent to the act of 1758, which requires a deed, or will in writing; and this, said the Court, although the gift in this case was such as was meant to be declared valid by the acts of 1785, and 1787, yet, nevertheless the proof in the present case was inadmissible, and the gift void; these acts being prospective, and not retrospective of cases happening before, especially as to this gift on which the suit was commenced in 1783. So in *Elliott v. Lyell*, in the same Court, 3 *Call.* 278. The question arose on a statute, enacting, that "the representatives of one jointly bound with another for the payment of a debt, and dying in the life time of the latter, may be charged as if the obligors had been bound severally, as well as jointly;" it was decided not to embrace bonds given before the passing of the act. ROANE J. said, I stand on this broad principle, that men in regulating their contracts, shall have the benefit of existing laws, and not have them overturned, or affected, by future laws, which they certainly could not foresee, or provide against. FLEMING J. Statutes are *prima facie* prospective in their operation; and retrospective laws, being odious in their nature, it ought never to be presumed the legislature intended to pass them, where the words will admit of any other meaning. Every construction, therefore, which goes to introduce a retroactive effect, and by altering the engagements of men, to defeat justice, is contrary to the principles of an enlightened jurisprudence; consequently, if the words be even doubtful, such construction ought to be made, as is most consistent with reason, and the rights of the parties to be affected. And PENDLETON, President, observes, that with respect to binding retrospective laws, in general, they merely vary the remedies on existing obligations, without adding to, or diminishing their original force; and it must be acknowledged, that retrospective laws, which either impair, or give force to, existing obligations or contracts, contrary to their situation at the time they were entered into.

*Pittsburgh*

*BIRSFOLD*

*v.*

*SHELLING*  
and others.

are against the principles of natural justice. Citizens contract, on a view of existing laws, without anticipating future regulations. The federal constitution has prohibited the state legislatures from passing any such laws. In the case of *Ogden v. Blockledge*, 2 *Cranch*, 272, the effect of an explanatory statute was under consideration. In that case, as in this, the statute was passed after the commencement of the suit, and it was urged by the counsel, that as the suit had been brought before passing the explanatory act, it would not alter the past law, and make that to be law, which was not law at the time. To declare what the law is, or has been, is a judicial power; to declare what the law shall be, is legislative power. One of the fundamental principles of our government is, that the legislative power shall be separate from the judicial power; but, that at all events, the statute could not affect that suit, which was brought before the law was passed. The Court stopped the counsel, considering the case too plain to be urged. So in *Gallego v. Queenall's administrators*, 1 *Hen. & Munf.* 204, an act, declaring, that in all cases where, hereafter, any injunction shall be wholly dissolved, the bill shall stand dismissed of course, with costs, was by adjudication, confined to injunctions awarded since the act. In *Dash v. Van Kleeck*, 7 *Johns.* 501, Ch. J. KENT observes, as this act was passed, not only after the escape, but after the suit brought, it can apply to, and govern this case, but in one of two ways; it must be considered, either as creating a new rule for the government of the past case, or, as declaring the interpretation of the former statutes, for the direction of the Courts. I should be unwilling to consider any act as so intended, unless that intention was made manifest by express words, because it would be a violation of fundamental principles, which is never to be presumed. The very essence of a new law, is a rule for future cases. The construction contended for on the part of the defendant, would make the statute operate unjustly. It would make it defeat a suit already commenced, or a right already vested; it would be punishing an innocent party with costs, as well as divesting him of a right previously acquired, under existing laws. In a very important and well considered case, *The Commonwealth v. Beaumarchais*, in the Court of Appeals, 3 *Call.* 168, the learned and venerable President of that Court, after defining the duties of the several departments, legisla-

1818.

*Pittsburgh*  
*Barren*  
*v.*  
*Seeling*  
*and others.*

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**Pittsburgh.**  
**BADFORD**  
**v.**  
**SETTLERS**  
**and others.**

tive, executive, and judiciary, proceeds to state, if a contract is entered into in behalf of the government, and a contest should arise about the meaning of the contract, it belongs to the judiciary to decide what that contract was, and if the legislature decide that question, they invade the province of the judiciary, contrary to the constitution. Judge YEATES, in delivering the opinion of the Court, in *The Attorney General v. Grantees, &c.* 4 Dall. 237, on the question to be settled under the act of 1792, observes, it is true, the act of 1802, in its preamble, expresses, that it appears from the act of 1792, that the Commonwealth regarded a full compliance with these conditions of settlement, improvement, and residence, as an indispensable part of the purchase, or consideration of the land itself; but the true test of title must be resolved into the legitimate meaning of the act of 1792, extracted *ex visceribus suis* independent of any legislative exposition. He commences the opinion, by declaring, that it is obvious the validity of the claims of the warrant holders and the actual settlers, must depend on the true and correct construction of the act of 3d April, 1792, considered as a solemn contract between the Commonwealth and each individual, leaving every case to depend on, and be governed by, its own particular circumstances, and declaring that the warrants may, or may not, be valid, and effectual in law, against the Commonwealth, according to the several times and existing facts accompanying such warrants. I will only add, that the construction contended for by the defendants in error, would make this act the exercise of a judicial power by the legislature; an injunction on the Court, to restrain a recovery, in a cause pending, unless the plaintiff conveyed to the defendant, a portion of the property in dispute.

On the grounds on which my opinion is founded, it is unnecessary to decide, whether, if this act did extend to this case, it would be unconstitutional and void; as I would not go out of my way to court the discussion of a question of such delicacy and importance, so I would not fly from the inquiry, when it becomes necessary; when it is rendered so, it will be met in this Court with all the respect due to every legislative act, but with a just regard to the constitutional rights of the people.

The importance of this question will afford me a justification for the time I have taken in delivering this opinion.

I considered it my duty to give the subject the fullest investigation; to state the grounds of that opinion; the reasons and authority on which it is founded. It is for these reasons, and these authorities, I have stated my opinion that the Court of Common Pleas erred, in withdrawing this case under its circumstances, from the jury, and in declaring that the act of 14th *March*, 1814, was a bar to the plaintiff's recovery, as the act did not include the case then before the Court, and that judgment be reversed, and a *venire facias de novo* awarded.

1818.

*Pittsburgh.*

BEDFORD

v.  
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Judgment reversed, and a *venire facias de novo* awarded.

END OF SEPTEMBER TERM, 1818.



1819.

Pittsburgh.HINDS *against* KNOX.

IN ERROR.

September.

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153 616

THIS was an action of trespass *quare clausum fregit*, brought by *Michael Hinds*, against *George Knox*, in the Court of Common Pleas of *Westmoreland* county, for entering upon his lands, and cutting down and carrying away trees. The defendant pleaded not guilty, and not guilty within six years. The jury found a verdict for the plaintiff for "six cents damages, and all costs of suit." There was no certificate by the Judge that the freehold or title of the land mentioned in the declaration was chiefly in question, agreeably to the 16th sect. of stat. 22 & 23, Ch. II. c. 9., reported to be in force in this State, (3 *Binn.* 624. *Purd. Dig.* 420. note.) The Court below entered judgment for the plaintiff, *without costs*.

In an action of trespass *quare clausum fregit*, if the jury find less than forty shillings damages, for the plaintiff, and full costs, he is entitled to recover full costs, though there is no certificate by the Judge, agreeably to the 16th sect. of the stat. 22 & 23 Car. II. c. 9., that the freehold or title of the land was chiefly in question.

*Kelly*, for the plaintiff in error, urged that the plaintiff was entitled to full costs. Though the Court are restricted by the statute, yet the jury are not; they may therefore give full costs, in lieu of damages. In the analogous case of an action of slander, it is stated in *Browne v. Gibbons*, (a) to have been resolved by all the Judges of King's Bench and Common Pleas, that in an action on the case for slander, though the Court are bound by 21 *Jac.* 1. c. 16, and cannot increase the costs, where the damages are under forty shillings, yet the jury are not bound by that statute, and therefore, they may give ten pounds costs, where they give but ten pence damages. This decision is recognised in *Lewis v. England*, (b) and the principles of it apply in full force, in an action of trespass *quare clausum fregit*. The act of 22d *March*, 1814, does not take away the costs, where the damages are under 100 dollars.

*Reed*, contra, answered, that the statute expressly requires a certificate, to entitle the plaintiff to costs. The case of *Lewis v. England*, designates the action of slander, as the only exception to the general rule, that the jury, as well as

(a) 1 *Salk.* 207.(b) 4 *Binn.* 5.



1819. the Court, are bound by the words of the act, and even that  
*Pittsburgh.* is reluctantly assented to by the Chief Justice. 4 *Binn.* 11.  
 HENDS But the 4th sect. of the act of the 22d March, 1814, introduces  
 v. the provisions of the 100 dollar law, in actions of trespass,  
 KNOX. for damages, not exceeding 100 dollars; and that is conclusive.

The opinion of the Court, (TILGHMAN C. J. being sick and absent,) was delivered by

GIBSON J. To this action of trespass *quart clausum fregit*, the defendant pleaded, *non cul*, and the statute of limitations; and the jury found for the plaintiff; *six cents damages*, "and all costs of suit." There was no certificate; and as it did not appear by the pleadings, that the title came in question, the Court rendered judgment on the verdict, without costs. There is no doubt, but the question is unaffected by any thing in the act of assembly, passed the 22d March, 1814, *Purd. Dig.* 363, giving jurisdiction to justices of the peace, in actions of trespass, where the damages do not exceed 100 dollars. The fourth section provides, that "the process, return thereof, notices, awards, judgments, and appeals, and the proceedings of justices, constables, referees, and Courts, and every proceeding necessary to carry this act into effect, which is not herein specially provided for, shall be made and done, under and according to the provisions and regulations in similar cases contained" in the 100 dollar act, and its supplements; and as by the provisions of the 100 dollar act, if a plaintiff recover less than 100 dollars in Court, he is to take his judgment without costs, it is inferred that the same provision is extended to actions of trespass. But the trespass act adopts only those provisions of the 100 dollar act, which are immediately necessary to carry the former into effect, but not those that are unconnected with the details of the suit, in its progress before the justice, or in Court, after it is brought there by appeal. Every thing of an ancillary or subordinate nature was to be supplied from the provisions of the 100 dollar act; but no distinct substantive provision of it, not immediately connected with the execution of the powers conferred, was to be engrafted on the trespass act. This peculiar provision of the 100 dollar act is not necessarily connected with the execution of any jurisdiction delegated to justices of the peace; but is, in fact, a

regulation applicable to proceedings not before justices of the peace at all, but in the Courts of Common Pleas. I cannot therefore say, that the jurisdiction of the courts of common law shall be indirectly affected by an application of the principle, to cases never intended to be within the trespass act, even as respects the mode of proceeding; for it would be a forced construction, to say that act had any connection with a cause, that never was in any shape before a justice, but was commenced in the Court of Common Pleas. The question must then depend on the *Stat. 22 & 23. Car. 2. c. 9. s. 136, (Purd. Dig. 420. note,)* which is reported by the Judges of this Court, as being in force here. I confess, that before that report, I never heard it suggested, that statute was extended here; nor have I ever known a judgment rendered without full costs, where the verdict in trespass, was for less than forty shillings; but in every instance nominal damages carried full costs. Without saying whether the report of the Judges, being under a special act of assembly, is to have the effect of concluding all question on the subject, I am content for the present, to take this statute, as it has been reported, and to rest the matter on its construction, which has always been, that although the Court cannot add the costs *de incremento*, yet the jury may find any sum *in costs*, they please. *Page v. Kirk*, 2 Vent. 36. 6 Vin. Costs, L. pl. 36. So, under the analogous statute of the 21 Jac. 1. c. 16, where the jury in any action on the case for words, give less than forty shillings, they may give full costs, *Brown v. Gibbons*, 1 Salk. 207. The true reason why the Court is bound while the jury are not, seems to be, that there being no measure of damages in those cases which fall within these statutes, the jury are not bound to give damages *eo nomine*, but may substantially do the same thing in another form, by increasing the costs to the amount of the damages intended to be given. I am aware that in the case of *Lewis v. England*, 4 Binn. 5, it was decided, that on appeal from the judgment of a justice, where a less sum is recovered than the amount of the judgment of the justice, the jury are not at liberty to find full costs; and from this it would at first seem, the Court laid down as a general rule, governing in all cases except only that of slander, that where a statute says a party shall not recover costs, neither a jury, nor arbitrators, can give them. I do not mean to controvert

1819.

*Pittsburgh.*

Himes

v.

Knox.

1819. *Pittsburgh.* in the smallest degree, the propriety of that decision, but only to add one more exception to the principle it contains. *HINDS* Where there is a fixed measure of damages, beyond which, *v.* as in *Lewis v. England*, the jury cannot go, they must be *KNOX.* governed by it; but where they are controuled by no standard, it would be idle and without any practical effect, to say they must give damages only as such; for the costs, which are almost always given as a compensation for the injury, would then be given, as in truth intended, by the name of damages. As then we conceive the plaintiff has been improperly deprived of his costs, the judgment as to the costs, must be reversed, and entered in favour of the plaintiff for full costs.

Judgment as to costs reversed, and judgment for plaintiff for full costs.

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130 340

### GRAY *against* PENTLAND.

IN ERROR.

September.

[For a former report of this case, see Vol. II. p. 23.]

In an action for a libel on the plaintiff, contained in an affidavit made by the defendant, and sent to the Governor, relative to the plaintiff's official conduct, in an office held at the Governor's will, the want of probable cause in the defendant, may be left to the jury as evidence of malice.

ERROR to the Court of Common Pleas of *Allegheny* county.

This was an action brought by *Pentland*, the plaintiff below, against *Gray*, for defamatory language contained in an affidavit made by *Gray*, and sent to the Governor of the Commonwealth, "touching the official conduct of the plaintiff, who was the prothonotary of the Court of Common Pleas of *Allegheny* county;" and also for verbal slander in promulgating its contents.

It appeared in evidence, that a rough draft of this affidavit had been drawn up by *Gray*, and handed by him to *George Cochran*, with a request that he would transcribe it, and put it into form, which he accordingly did. *Gray* then went be-

The proof of the fact, from which malice is to be inferred, lies on the plaintiff.

fore *W. Steele*, esq. a justice of the peace, and requested Mr. *Steele* to swear him to the contents of the paper. Mr. *Steele* inquired of *Gray*, whether he was acquainted with the contents of the paper, and being answered in the affirmative, he swore *Gray* to the truth thereof. After *Gray* had sworn to and subscribed the affidavit, he requested the magistrate to read it, which he did. *Gray* then observed, that he considered himself aggrieved by *Pentland's* official conduct, and intended to send on that affidavit to the Governor, for the purpose of having *Pentland* removed from office. The defendant justified on the ground, that the affidavit was made for the purpose of causing an inquiry to be instituted into the official conduct of the plaintiff, and his fitness for office.

1819.

*Pittsburgh.*

GRAY

v.

PENTLAND.

The Court below were requested by the defendant's counsel, to charge the jury on the following points, viz.

1st. Whether if the deposition by the defendant, which has been given in evidence, was made for the purpose of being forwarded to the Governor, and actually forwarded accordingly, with the intention of procuring an investigation of the plaintiff's official conduct, and fitness for office, by the Governor, will not the occasion of making the said deposition, excuse the defendant in this action for making the same, unless the plaintiff prove *express malice* on the part of the defendant, even although the defendant should not prove the facts therein stated, to be true ; or, is malice to be implied on the part of the defendant, unless he shews, that the facts stated are true, or that there was a probable cause *at the time*, to believe them to be true ?

2d. If it be necessary to shew, on the part of the defendant, a probable and reasonable cause to believe the facts stated in the deposition to be true, and if the defendant has proved to the jury, and the jury should believe, there was probable cause for making said deposition, will not the defendant be excused for making the same, although made with the intention of producing the removal of the plaintiff from office ?

The Court charged the jury as follows :—

It is the opinion of the Court, that in order to render the defendant in this case culpable, the existence of *malice*, as well as *falsehood*, must be satisfactorily established.

The existence of this malice may be shewn in several ways, or from a combination of various facts and circumstances.

1819. In ordinary cases, *falsehood* is evidence of malice ; but in  
*Pittsburgh.* a case like the present, we should think that something more  
 GRAY ought to be required ; namely, the absence of reasonable and  
 PENN. probable cause at the time when the charge was made. If  
 the charges were true, or, if there were reasonable and probable grounds for making them, the defendant would be justified, although his object were the removal of the plaintiff from office. But, on the other hand, if the charges were maliciously made, and be equally destitute of *truth* and of reasonable and *probable* cause, the plaintiff will be entitled to your verdict, for such damages as you may think the defendant ought to be amerced in, for an injury of this kind.

Idle and vague rumours will not constitute *probable cause*. To constitute probable cause, there must exist such grounds for believing the facts to be true, as are calculated to impress themselves on, and find credence in, a candid mind, disposed to inquire and to act justly. This is a subject for the consideration of a jury. It is for them to determine, whether probable cause existed or not.

In respect to the charges of *verbal* slander, contained in the first and second counts of the declaration, it is proper to inquire how far they have been established by the evidence. If the defendant has wantonly and maliciously promulgated the contents of this deposition, to vilify and traduce the character of the plaintiff, he can no otherwise be justified than by proving the truth of them. In such case the falsehood alone would be evidence of malice. As to communicating the contents to Mr. *Cochran*, if it were with the view to have it put into form or to have it fairly transcribed, I should not incline to consider it to be a publication. But I can see no good reasons for communicating the contents to Mr. *Steele*. Mr. *Steele* seems not to have considered it his official duty to read it ; and I am of opinion, he thought correctly. It was sufficient for him to know from the party making it, that he was acquainted with the contents. Had he, however, thought otherwise, and insisted on reading it, I should hold this to be no publication by the defendant. As a person is not punishable for perjury in making a voluntary affidavit, the propriety of taking them, by justices, has properly been questioned.

To consider the defendant liable in respect to the verbal communication of the words, it ought to appear that it was unnecessarily and wantonly done.

The jury found a verdict for the plaintiff.

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Pittsburgh.

GRAY  
v.

PENTLAND.

*Foster*, for the plaintiff in error, insisted, that the Court erred in stating, that want of probable cause was evidence of malice. Here the words were excused by the occasion, unless there was positive evidence of express malice. It is not the duty of the defendant to prove the existence of probable cause, but of the plaintiff to prove its absence. 1 *Binn.* 186. 5 *Johns.* 529. 1 *Saund.* 131. 2 *Esp. N. P.* 509.

*Wilkins* and *Baldwin*, contra, were stopped by the Court.

The opinion of the Court, (TILGHMAN C. J. being sick and absent,) was delivered by

GIBSON J. It is undoubted, that the occasion of the affidavit, which constituted one ground of the action, so far excused the use of the defamatory words, that malice would not be implied from the use of those words alone; and hence it was necessary, that actual malice should be proved. The question is, will any thing short of *direct* and *positive* proof of express malice be sufficient? As to that, I cannot doubt. In an action for a malicious prosecution, which is in many respects analogous to the present, and in which malice and the want of probable cause must both concur, the latter may be left to the jury as evidence of the former. Then, why not here, where it does not of itself constitute a distinct and substantive ground of the action, but can have weight only as evidence of actual malice? For I take it, that though probable cause should even have existed, the plaintiff might, nevertheless, have maintained the suit, if he could have proved that the defendant was not deceived as to the true state of the case, but acted throughout against his better judgment, and from motives of wilful malice. Where the charge is proved to be false, the defendant can justify himself only by shewing, that he acted altogether from mistake, and with the most perfect good faith. It is carrying the protection of persons in the situation of the defendant below, far enough, to say they shall not be answerable for the consequences of mistake, if they have dealt honestly; and that the use of words of accusation, from which alone the law would otherwise infer malice, shall, on the ground of public policy, not be considered as importing it. Here, want of probable cause was not, as the counsel alleges, put to the jury as a circumstance from which the law would at all events imply malice; but as

1819. *Pittsburgh.* one from which its existence might, or might not, be inferred by the jury. If, then, absence of probable cause be evidence of actual malice, though not a circumstance from which the law will infer it, it is difficult to discover an error in this part of the charge. But it is said, that although express malice may be established by presumptive proof, yet that the defendant raised a question, whether he was bound to shew the existence of probable cause, or whether the plaintiff was bound in the first instance to shew its absence, as an original part of his case. That was a question of easy solution. If, from the plaintiff's own shewing, it appear the words were used in a communication to the executive, (and in every case like the present, it must necessarily so appear,) he will fail, unless he superadd proof of express malice, whether it be want of probable cause, or any other circumstance; for the implication of malice that would otherwise result from the use of words actionable in themselves, will be rebutted by the peculiar nature of the occasion. In this respect, such a case is analogous to that of a master, who, having been applied to for the character of a servant, is not bound in an action of slander, to prove the truth of the character given; but it lies on the servant to prove its falsehood, and also express malice. This question, as to the *onus probandi*, can be material, only where the state of the fact, as to express malice, is doubtful: in which case the verdict ought perhaps to be against the party whose business it is to make it out to the satisfaction of the jury. But here, it seems pretty clear, the Court instructed the jury, that the proof lay on the plaintiff. The direction was, that the defendant would not be culpable, unless the existence of malice, together with the falsehood of the charge, were satisfactorily established. That could be done only by proof of the fact, and therefore, every idea of its negatively arising from the absence of proof to the contrary, was necessarily excluded from the mind of the jury; for all facts necessary to render the defendant liable, were to be established by some one, and certainly not by the defendant himself. The plaintiff relied on the absence of probable cause, to prove malice; and the jury must therefore have understood the Court, that the proof of the fact from which the malice was to be derived, if at all, necessarily lay on the plaintiff. The judgment must be affirmed.

Judgment affirmed.

# CASES

IN THE

## SUPREME COURT

OF

### PENNSYLVANIA.

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SOUTHERN DISTRICT, SEPTEMBER TERM, 1818;

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The Commonwealth *against* GREASON.

1818.  
Chambers-  
burg.

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IN ERROR.

Friday,  
October 2.

ON a *habeas corpus* directed to *James D. Greason*, com- manding him to bring before the Court, the body of *Bob*, a mulatto man, it appeared, that on the 21st *November*, 1792, *William Gibson* returned to the clerk of the peace of *Cumberland* county, a certain male mulatto child, named *Bob*, born of his negro wench, named *Hannah*, on, or about the 23d *May* last. This report was entered of record, on the day on which it was made, in the following manner, “ *William Gibson*, of *East Pennsborough* township, farmer, one male negro, born the 23d *May*, 1792, named *Bob*.”

The report required by the 4th section of the act of 29th March, 1788, to be made under oath, of the age, name, and sex, &c. of a negro or mulatto child, should state the age with such certainty as to leave no doubt that the report was made within six months after the birth of such child,

*Mahon* and *Metzgar* for the prisoner, contended that the requisitions of the act of 29th *March*, 1788, (sect. 4.) (a) had not been complied with, by the return in the present case. The act which was made in favour of liberty, and ought to be strictly construed, requires, that all persons who wish to avail themselves of the benefit of it, should among other things, make a report under oath, of the *age* of the child

(a) *Purd. Dig.* 481.



1818. whose services they claim. It is obviously essential, that the age should be positively stated; but the return in this instance, has nothing certain and definite; *about*, may extend to several days, or even a week. It is impossible therefore to know from the report, which was not made until the 21st *November*, whether it was within the time prescribed by law. Under the circumstances of the case, the oath wears a very suspicious aspect.

*Chambersburg.*

The Commonwealth  
v.  
GREASON.

*Carothers*, for the defendant, answered, that the act of assembly very properly required the oath of the master respecting the age of the child, to be only to the best of his knowledge and belief, for it was impossible in every case, to be altogether exact on such a subject. On, or about the 23d of *May*, means, the day preceding, or subsequent. This would bring the return within the six months. The entry on the record was made on the 21st *November*, and states the birth of the child, to have been on the 23d of *May*.

By THE COURT. The act of 29th *March*, 1788, directs that the master shall make a report in writing, to the clerk of the peace of the county, within six months after the birth of the child; which report shall contain the age, name, and sex of the child, &c. The report is to be verified by the oath of the master, to be entered of record by the clerk of the peace, and to be admitted as legal evidence in courts of justice. Unless this is done, the master forfeits all right to the service of the child. Now has the law been complied with, in this case? Has a report been made within six months from the birth of negro *Bob*? We cannot say that it has. The report leaves us in doubt. It states that *Bob* was born on, or about the 23d *May*, 1792, and this report was delivered to the clerk of the peace, on the 21st *November* following. What Mr. *Gibson* meant by *about*, we know not. It may be, that in his mind, *about*, included several days; and then, *Bob* might have been born about the 23d *May*, and yet the report may not have been made within six months. All that can be concluded, is, that the report was made in about six months, but whether within six months, is doubtful. It lies upon the master to prove, that the law had been complied with, and as this has not been done, it is the opinion of the Court, that negro *Bob* should be discharged.

Prisoner discharged.

HUMES against M<sup>c</sup>FARLANE and another.

1818.

Chambers-  
burg.

IN ERROR.

WRIT of error to Cumberland county.

Monday,  
October 5.

*John and Alexander M<sup>c</sup>Farlane*, the plaintiffs below, claimed the land for which this ejectment was brought, under a warrant granted to their father, *John M<sup>c</sup>Farlane* deceased, on the 3d April, 1800, for 200 acres, including an improvement, adjoining lands of *Samuel M<sup>c</sup>Cormick*, *James M<sup>c</sup>Farlane*, *George Buck*, and *Daniel M<sup>c</sup>Daniel*, in *Mifflin* township; interest to commence on the 1st March, 1770. On this warrant a survey was made on the 9th April, 1800. On the 2d September, 1813, *John M<sup>c</sup>Farlane* made his testament and last will, containing the following devise, under which it was contended, the land in question passed to the plaintiffs.

When a warrant refers to an improvement, and mentions a particular day from which interest is to be paid on the purchase money, it is not necessary for the warrantee to prove an improvement on that day; he may give evidence of an improvement at any time subsequent to it, but prior to the issuing of the warrant.

A warrantee cannot give evidence of an improvement made at any time prior to the day mentioned in his warrant for the commencement of interest, even where the board of property have decided, on a caveat entered against the acceptance of the survey made on his warrant, that his title originated in a settlement made by another

"I also give and bequeath to my sons, *John and Alexander*, all that my messuage or tenement whereon I now live, situate, lying, and being in *Mifflin* township, county of *Cumberland*, and state of *Pennsylvania*, together with all and singular the appurtenances thereunto belonging, to hold to them, and their heirs or assigns forever, to be divided among them according to an instrument drawn before, and now in the hands of the heirs of *Daniel M<sup>c</sup>Daniel* deceased."

The defendant derived his title from a warrant to *James M<sup>c</sup>Farlane*, dated the 16th December, 1799, for 40 acres, adjoining lands of *Daniel M<sup>c</sup>Daniel*, *George Buck* and others, in *Mifflin* township; interest to commence on the 1st December, 1779. A survey was also made on the 9th April, 1800, in pursuance of this warrant, of 44 acres.

*James M<sup>c</sup>Farlane* was the father of *John*, and the grandfather of the plaintiffs, and the 44 acres surveyed on his warrant were included in the 200 acres, for which his son *John* obtained a warrant. The old man claimed under a settlement made by one *Alexander M<sup>c</sup>Clintock* in the year 1766, and on a caveat entered by *John* against the acceptance of

person, at an earlier period, and have directed a patent to issue to him, in virtue of that settlement. If counsel request the Court to instruct the jury on a material point, and they omit to do so, it is error.

1818. *Chambers-burg.* the survey made on his father's warrant, the board of property decided, that the land was held under that settlement, and directed a patent to be issued to him in virtue of it, as of the year 1766. The defendant alleged and endeavoured to prove, that *James M<sup>c</sup>Farlane* had given his son *John*, all his right under this settlement, except the said 44 acres, which he reserved to himself. On the other hand, the plaintiffs, the grand-children of *James*, averred and endeavoured to prove, that their father, *John M<sup>c</sup>Farlane*, was himself settled on the tract containing 200 acres, to the whole of which, including the 44 acres in dispute, he was entitled in exclusion of his father. Both parties gave evidence in support of their respective pretensions, and the evidence was contradictory.

HUMES  
v.  
M<sup>c</sup>FARLANE  
and another.

It appeared, that *Samuel Mitchell*, to whom *James M<sup>c</sup>Farlane* had conveyed his title, and who subsequently conveyed it to the defendant, had in the year 1808, recovered the land in an ejectment brought against *John M<sup>c</sup>Farlane*.

The counsel for the defendant requested the Court to instruct the jury on the following points.

1st. "That if the jury should be of opinion from the testimony, that *John M<sup>c</sup>Farlane*, the son, occupied the 44 acres in dispute, under the acknowledged right of the father, and lines were made dividing their rights, that then the possession of *John*, was the continued possession of *James*, and that *James* might take a warrant for the 44 acres, within the division line, in his own name; and that if *John* took a warrant for the whole land, he would be a trustee for *James* as to the 44 acres, and chancery would compel him to convey to *James*, or to his alienee.

2d. "That by the will of *John M<sup>c</sup>Farlane* there was no title given to the land in dispute, as the testator had been dispossessed of it, four years before the date of the devise."

THE COURT, after briefly stating the titles of the parties respectively, expressed themselves in their charge to the jury, in the following manner.

"Both plaintiffs and defendant claim under warrants founded on improvements, and on this point the law is well settled, that a warrant holder, claiming under an improvement, precludes himself from deriving his equitable title of improvement, beyond the day called for in his warrant. The plain-

tiffs cannot found their title on any improvement made previously to the 1st *March*, 1770, nor the defendant previously to the 1st *December*, 1779. 1818.

*Chambersburg.*

“ One point made then, is, which of the warrant holders first made such an improvement on the 44 acres in question, as the law requires, to entitle him to the right of pre-emption; that is, to give him a right to have the title perfected by the State, by a warrant and patent.

HUMES  
v.  
M'FARLANE  
and another?

“ The settlement defined by the act of 1786, is an actual, personal resident settlement, with a manifest intention of making it a place of abode, and the means of supporting a family. And the law of 1794, declares, that no application shall be received, except for such lands whereon a settlement has been made, grain raised, and a person, or persons residing.

“ Both parties have given evidence respecting improvement and possession.” [Here his honour reviewed the evidence.]

“ If the defendant has given no proof of any improvement or settlement on the land in question, by those under whom he claims, *on the 1st December*, 1779, then the warrant, which is founded on an alleged improvement, *would be of no avail to him*, and would vest no title to the land in dispute, or any part of it. If, on the other hand, you are of opinion that a settlement was made by *John M'Farlane*, on the 1st *March*, 1770, agreeably to law, and continued from that time to the date of his warrant, he would be entitled to recover.

“ But it is alleged on the part of the defendant, that on the 1st *December*, 1779, such a settlement was made by *James M'Farlane*, as is contemplated by the law, and was continued by him, placing his son as his tenant on the land, with whom he afterwards resided; that the land in question was comprehended within the settlement; that he gave his son a part, and reserved the residue, which included the 44 acres, to himself.

“ In this case, the settlement first made by *James M'Farlane*, if made in the time mentioned in his warrant, would extend as well to the 44 acres, as to the part of the land given to *John M'Farlane*, and would protect his right. But no claim of the kind can go further back than the 1st *December*, 1779.”

The verdict was for the plaintiffs, and the defendant took a writ of error.

1812.  
*Chambers-  
 burg.*  


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*HUMES*  
*v.*  
*M'FARLANE*  
*and another.*

*Parker and Watts*, for the plaintiff in error, admitted the rule generally to be, that a man shall not be permitted to take advantage of an improvement made before the time designated in his warrant for the commencement of interest, but denied that it was universal, and insisted, that this case formed an obvious exception to it, springing out of the source from which the rule itself issued. The reason upon which all those cases proceed, which are relied upon to establish that position, is, that if the warrantee were not estopped by his averment, he would derive an advantage from his own misconduct, and commit a fraud upon the Commonwealth. That reason, however, did not apply in the present instance. By the decision of the board of property, *James M'Farlane* was to receive a patent, in virtue of *M'Clintock's* settlement in 1766, and interest was to be paid from that period. There was therefore no fraud upon the Commonwealth, who had received all they could be entitled to, and consequently there could be no reason, why the defendant below should not have been permitted to prove his improvement so far back as 1766. Having been compelled to account for interest from that time, it would indeed be hard and unjust if he could derive no advantage from it.

In the second place they contended, that the omission to give a full, clear, and distinct answer to the first question proposed by the defendant below, and the statement of a position, unfounded in law, in the answer which was given, were error. No answer whatever was given to the question, whether, if *John M'Farlane* was the tenant of his father, of the land in dispute, he was not his trustee for the 4<sup>th</sup> acres which he had included in his own warrant. This was an important question, on which the jury ought to have been instructed. Nor was the answer, imperfect as it was, correct in point of law. To say, that if no settlement was made on the 1<sup>st</sup> December, 1779, the warrant was void, was a position incapable of being supported; for though there was good reason in ordinary cases, for excluding evidence of an improvement before the time pointed out by the warrant for the payment of interest, yet there was none why evidence should not be given, of one made subsequent to the time to which the warrant referred, but prior to the issuing of the warrant. There was neither reason nor authority to give colour to such an idea. Indeed the subject did not afford room for argument.

In the last place, they complained that no answer was given 1818.  
 as to the validity of the devise contained in the will of *John Chambers*.  
*McFarlane*, which they insisted vested no interest in the dis-  
 puted land in his sons, the plaintiffs below. The devise was  
 of the messuage and tenement on which he then lived, with  
 the appurtenances. He did not then, reside on the land in  
 controversy, having been dispossessed of it four years before,  
 by a verdict and judgment in ejectment. It is impossible,  
 therefore, that the land of which he had been thus legally  
 dispossessed, could be considered as appurtenant to that on  
 which he resided. But whatever might be the construction  
 of the law on this devise, the defendant was entitled to an  
 answer to the question proposed, and it was error not to  
 give it.

*HUKES*  
*v.*  
*McFARLANE*  
 and another.

*Garrothers*, for the defendants in error, answered, that the law had been long and well settled, that a warrantee is estopped from carrying back his improvement beyond the time mentioned in the warrant for the commencement of interest. This was placed beyond a doubt, by the cases of *Garrol v. Andrews*, (a) *Merchant v. Millison*, (b) and *Reigart v. Haverstock*, (c) In the last of these cases, the rule was declared not only to be applicable to a plaintiff seeking to recover possession, and who must rely upon the strength of his own title, but to a defendant also, who it was declared cannot be permitted to shelter himself under an improvement made at an earlier period than that mentioned in his warrant. Nor was there any room for the alleged distinction founded on the decision of the board of property, who had no power to alter, vary, or suspend an established rule of property, or to introduce a new one. The truth of this argument, is exemplified by the case of *Bixler v. Baker*, (d) in which, though the plaintiff had obtained a patent for land surveyed under a warrant issued after the 22d September, 1794, his title was obliged to give way to a settlement made by another person subsequent to the warrant, but before the patent, because there was no personal resident settlement on the land, when the warrant issued.

With respect to the second point, he contended, that the Court had given a sufficient answer to the defendant's ques-

(a) 2 Sm. L. 177. 3 Yeates, 59. S. C.

(c) 2 Sm. L. 178. 3 Yeates, 591.

(b) 2 Sm. L. 178. 3 Yeates, 73. S. C.

(d) 4 Binn. 213.

1818.  
*Chambers-  
 burg.*  
 HUNES  
 v.  
 M'FARLANE  
 and another.

tion. After stating the question, they leave to the jury the decision of the fact, whether or not the first settlement was made by *James M'Farlane*, and consequently, whether *John* was on the land as his tenant; and then proceed to inform them, that if *James's* settlement was made at the time mentioned in the warrant, it would protect his right. This was substantially telling them, that if *John* was the tenant of his father, he was to be viewed in the light of a trustee.

On the last point he observed, that although the Court below did not profess to give a distinct and separate answer to the second question submitted to their decision, they had in effect, given a complete one. "If," says the Judge, "you are of opinion, that a settlement was made by *John M'Farlane*, on the 1st *March*, 1770, agreeably to law, and continued from that time to the date of his warrant, he would be entitled to recover." Now, as the plaintiffs below derive their title through the devise of their father *John*, a declaration that they would be entitled to recover, provided their father's settlement were made at a particular time, agreeably to law, clearly amounts to the expression of an opinion as to the validity of the devise; because, unless the estate passed by the devise, they could not recover. But supposing no answer whatever to have been given, it was not error, because the answer must have been against the defendant below. The circumstance of the devisor being out of possession, would not prevent the vesting of the devise. The rule which in *England* requires *seisin*, to give effect to the alienation of real estate, originated in feudal principles, which never had an existence in *Pennsylvania*, and the rule of law on this subject, which is the offspring of that system, never prevailed here. The point was made, in relation to a transfer by deed, in the case of *Stoecker v. Whitman*,<sup>(a)</sup> and it was decided, that the want of possession in the grantor, did not affect the validity of the conveyance. The words "messuage or tenement wherein I now dwell, with the appurtenances," are sufficiently descriptive of the land in question. It was embraced in the warrant, by which he held the tract on which he resided; and though he was then out of possession, he still kept up his claim to it. It was therefore appurtenant to the rest of the property, although he was not in the actual enjoyment of it. A devise of a particular house in which *W. N.*

(a) 6 *Binn.* 416.

dwelleth, without mentioning the appurtenances, was held 1818.  
to pass what properly formed part of the establishment, *Chambers-*  
though only a part of the premises were occupied by *W. N.*  
*Chamberlain v. Turner.*(b)

HUMES  
v.  
M'FARLANE  
and another.

TILGHMAN C. J. After stating the case, delivered the opinion of the Court, as follows:—The counsel for the defendant, prayed the Court to direct the jury, to the following effect.

1st. That if the jury should be of opinion, that *John M'Farlane*, the son, occupied the 44 acres in dispute, under the acknowledged right of his father, and that lines were run, dividing the said 44 acres from the rest of the tract; then the possession of the son, was the possession of the father, who might take a warrant for the said 44 acres in his own name; or, in case the son took a warrant for the whole 200 acres, he would be a trustee for his father, as to the said 44 acres. To this, the Court answered, "that if such a settlement was made by the father on the 1st *December*, 1779, as is directed by law, and his son was placed by him on the land, as his tenant, and if the land in question was comprehended within the said settlement, and if, added to this, he gave his son part of the said settlement, and reserved to himself part, including the said 44 acres, in such case, the settlement first made by the father, would extend as well to the 44 acres, as to the part given to the son, and would protect the right of the father." I do not think, that this answer is so direct as to inform the jury distinctly, what was the Court's opinion on the questions proposed; and in one respect, there appears to be an error. I mean in that part of the opinion, which supposes, that in order to vest in *James M'Farlane*, a right under his warrant, it was necessary that his settlement should have been in existence on the 1st *December*, 1779, the day from which he was to pay interest on the purchase money, according to his warrant. I should be at a loss to determine, whether that was really the meaning of the Court, were it not for another part of the Judge's charge, in which the same sentiment is clearly expressed. These are his words, "If the defendant has given no proof of any improvement or settlement on the land in question, by those under whom he claimed, on the 1st *December*, 1779, then

(b) 4 *Cruise on Real Property*, 188. *Cro. Car.* 199.



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 and another.

the warrant, which is founded on an alleged improvement, would be of no avail to him, and would vest no title to the land in dispute, or any part of it." Now it is very clear, that if the defendant proved a settlement *at any time, before the date of James M<sup>c</sup>Farlane's warrant*, although subsequent to the 1st *December, 1779*, the warrant would be valid, and the land surveyed under it, would be the estate of *James M<sup>c</sup>Farlane*, unless there had been a prior appropriation of it by some other person. The 1st of *December, 1779*, was the time mentioned on the warrant, from which interest was to commence; and if the settlement were really made *after that day*, the Commonwealth would be the gainer, by receiving more interest than the warrantee ought to have paid. All which the law requires, is, that a settlement should actually be made before the issuing of the warrant. At what time it was made, is immaterial, except for the purposes of ascertaining the time when the calculation of interest is to commence. I agree with the Judge, in another part of his charge which has been complained of, *viz.* that neither plaintiff nor defendant, should be permitted to allege a settlement at any time *prior to the day mentioned in their warrants, for the commencement of interest*, because such allegation would be contrary to the averment in their warrants, and would shew that they had attempted to defraud the Commonwealth. This principle has been so well established, that it must not now be disturbed. For decisions directly in point, I refer to the cases of *Carrol's lessee v. Andrews. 2 Sm. L. 177. Merchant's lessee v. Millison, 2 Sm. L. 178, and Reigart's lessee v. Haverstock, &c. 2 Sm. L. 178.* The counsel for the defendant, have endeavoured to shew, that this case does not fall within the general principle, because the board of property decided, on a *caveat* entered by *John M<sup>c</sup>Farlane*, against the acceptance of the survey on his father's warrant, that the title of the father originated in a settlement made by *Alexander M<sup>c</sup>Clintock*, in the year 1766. But the decision of the board of property can have no effect on the rules of the courts of law; and the rule by which a man is estopped from making an averment contrary to his warrant, was founded in some degree, on motives of policy; to preserve purity of morals, and to prevent fraud, by the fear of penalty. When it is understood, that a man hazards the loss of his land, by an attempt to deceive the officers of the land office, as to the

commencement of his settlement, there will be little danger of attempts to practise that kind of imposition. 1818.

The counsel for the defendant also prayed the opinion of the Court below on another point, and complained that no answer was given. In making out the title of the plaintiffs, the will of *John M'Farlane* had been given in evidence, by which he devised "all that, his messuage or tenement whereon he then lived, together with all and singular, the appurtenances thereunto belonging, to his sons *John* and *Alexander*, (the plaintiffs in this suit,) to hold to them, or their heirs or assigns for ever; to be divided among them according to an instrument drawn and in the hands of the heirs of *Daniel M'Daniel*, deceased. The Court was requested to direct the jury, "that this devise passed no title to the land in dispute, as the testator had been dispossessed of the land in dispute, four years before the date of the devise."—It may be proper to mention here, that the defendant had given in evidence, the record of an action of ejectment, in which *Samuel Mitchell*, claiming under *James M'Farlane*, had recovered the 44 acres now in dispute, from *John M'Farlane*, the testator. The Court below, no doubt through inadvertence, gave no opinion whatever on the point proposed, and the question being material to the support of the plaintiff's title, the withholding of the opinion was error. Of the right of a testator to devise land of which he has been disseised, I think there can be no question. The tenures attached to the feudal system, never having prevailed in *Pennsylvania*, we have paid no regard to that principle of the English law, which requires seisin in order to authorise the alienation of land by deed or will. Our statute of wills, made in 1705, enacts, that "all wills in writing, wherein or whereby any lands, tenements, or hereditaments within this province, have been, or shall be devised, being proved by two or more credible witnesses, &c. &c. shall be good and available in law, for the granting, conveying, and assuring of the lands or tenements, thereby given or devised." In the case of *Stoeper* (in error,) v. *The lessee of Whitman*, 6 Binn. 416, it was made a question, whether one out of possession could convey land by deed, and decided by this Court in the affirmative. The following is an extract of the opinion delivered by the Court. "When deeds and devises of land have been considered by our Courts, it has never been made a question, whether the grantor or de-

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visor, was in, or out of possession; and to make it now, would be to disturb what has been looked upon as settled." Nevertheless, the Court should have instructed the jury, in what manner the will of *John M'Farlane* was to be construed. The testator having devised "*all that messuage and tenement, whereon he lived, with the appurtenances,*" if the 44 acres now in dispute, were at that time separated from the plantation on which he lived, and he did not keep up his claim, they would not pass by the will; but if he did keep up his claim, they might pass. It was a question of intention, involving a fact on which the jury might decide. Whether an estate passes, is matter of law, but where that estate lies, or what is the extent of it, is fact. Light might be thrown on the intent, by reference to the instrument in the hands of the heirs of *M'Daniel*; but without doubt, the defendant had a right to the opinion of the Court on the point proposed. Upon the whole, I am of opinion, that the judgment in this case, should be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

PORTER and another *against* M'ILROY and another  
 administrators of LITTLE.

Monday,  
 October 5.

IN ERROR.

Taking a warrant for, and having a survey made, but not returned, of a less quantity than a settler is entitled to, is not conclusive evidence of an intention to abandon the part not included; it is a circumstance which may be explained.

Whether or not there has been an abandonment, is a fact which the jury, from a view of the whole case, are to determine.

If a point be placed fairly before the jury, and the Court give an opinion on the facts in favour of one party, but give it merely as opinion, and not as a direction binding on the jury, it is not error.

THIS was an ejectment brought in the Court of Common Pleas of *Huntingdon* county, by *James M'Ilroy* and *Joseph Jackson*, administrators of *John Little*, deceased, against *William* and *James Porter*, the facts of which, so far as they are material, appeared to be these:—*John Little*, in the year 1774 or 1775, settled on *Laurel run*, where he built a mill, which was burnt down and rebuilt in another place, planted an orchard, cleared a considerable quantity of land, and did all those acts which were necessary to make him a

*bona fide* settler. In the year 1786, he cleared a field of 1818. about ten acres on the land in dispute, which he occupied *Chambersburg*. until his death, and built a cabin for a schoolmaster. On the 14th March, 1786, he took out a warrant for 200 acres, including his improvement on the *Big Laurel Run*, calling for the adjoining lands. On this warrant no act was done until the year 1795, when *Joseph Eaton*, then in the employ of *John Canon*, deputy surveyor, made a survey of 439 acres and 14 perches, including the land in controversy. After the survey had been made, *Little* told *Eaton* not to return the draft, or write his name in it, until he procured a settler on the lower end, the part in dispute, and then he would have to return two drafts. On the 5th June, 1795, the surveying fees were paid by *Little* to *Eaton*, who afterwards paid them over to *Canon*, but there was no evidence when the draft was returned. In the year 1786, one *M<sup>c</sup>Alevy*, to whose line *Little* claimed, had a survey made of his land, of which *Little* complained, and some time afterwards when *Samuel Henry* was surveying an adjoining tract, *Little* told him he was coming to his line, and *Henry* at his request stopt. On the 2d May, 1812, *John Morrison* was called on by the plaintiffs to make a re-survey on the notes of *Eaton*, and he re-located *Little's* warrant on the lower part of the tract. The administrators wished the survey returned there, having sold the upper part of the tract on which *Little's* house and mill stood to *William M<sup>c</sup>Alevy*, who, on the 28th December, 1812, took out, at his own expense, a warrant for 220 acres, including an improvement; interest from the 1st March, 1774, on which a survey of 220 acres was made on the 19th February, 1813. When *Morrison* made his survey, the *Porters* had taken possession of the land in dispute, and had commenced improvements. In January or February, 1812, they had a cabin, and in the following October built a house on it. *Little's* warrant was returned on the 17th August, 1812, on the lower part of the tract, which *Morrison* thought agreed with the description in the warrant, as well as the upper end. It appeared, that *Little* had frequently been assessor and assistant assessor, and had returned only 200 acres for taxation, from the year 1794, until his death.

By his will, which was proved in January, 1812, *John Little* gave to *William M<sup>c</sup>Alevy*, his executor, power to sell the land; and *M<sup>c</sup>Alevy* renouncing the executorship, letters

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and another  
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1818. of administration, with the will annexed, were granted to the  
*Chambers-* plaintiffs.  
*burg.*

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 and another  
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 of LITTLE.

The Court were requested by the counsel for the defendants to charge the jury to the following effect.

1. That if they believed from the testimony, that it was the intention of *John Little* to place an improver on the lower end of the survey made by *Eaton*, and in that manner procure a warrant and survey of that part of the land, without paying interest from his first settlement, it was presumptive evidence, that he did not intend to include that part of the survey, or to hold it under the warrant given in evidence or under his improvement.

2. That a settler may claim less than 400 acres, and is not bound to take that quantity, and that the circumstance of *John Little* taking a warrant for 200 acres only, and of his returning 200 acres only for taxation, both before and after the survey made by *Eaton*, together with the other facts given in evidence in the case, if believed by the jury, afforded a presumption, that *John Little* did not intend to hold the land in dispute under his improvement, or under the warrant given in evidence.

3. That if the jury believed that *John Little* did not intend to pay the Commonwealth for the land in dispute at the rate which was charged for land in 1774, with interest from the date of his settlement, but on the contrary, intended to keep the land covered by the survey given in evidence, until he should find it convenient to place a settler on it, and procure a warrant on lower terms, the plaintiffs were not entitled to recover.

On these points, WALKER, President, instructed the jury thus :

1. That the facts were before the jury. The circumstance of *Little's* uniformly claiming the land, and the lines on the ground, were of more weight, than his declarations. If the jury were of opinion upon the whole evidence, that it was his intention to abandon the part in question, then it was common property, and any other person was at liberty to take it up. He might however, change his intention, and if he did so, before any third person had acquired an interest, he had a right to do it.

2. That a settler might take less than the law gave him, and his taking a warrant for 200 acres, was evidence, that he intended to be bound by that quantity, but it was not conclusive evidence, and might be rebutted by facts, tending to prove the contrary. The jury would weigh it with the other facts, and say, whether on the whole it was proof of his intention to abandon the extent to which he was authorised to go.

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3. That the circumstance of his returning 200 acres for taxation, before, and after the survey, though evidence, together with other facts, from which to form a presumption of the extent of his claim, afforded the weakest of all presumptions, because men were unwilling to be taxed, and many men, reputed to be honest, returned less than their claim; and the fact of a marked boundary, completely destroyed, or went a great way to destroy the presumption which arose from his returning less than his real claim. If it appeared to the jury, that it was the intention of *Little* to defraud the Commonwealth by putting a settler on the land, and not paying interest from 1774, and before he changed that intention, if he ever did change it, a third party came in and acquired title, the plaintiff would not be entitled to recover. But if they believed he intended honestly and fairly to pay the Commonwealth for the land, the plaintiffs were intitled to recover.

To this opinion, the counsel for the defendants tendered a bill of exceptions, which was sealed by the Court.

*Thompson*, for the plaintiffs in error.

If the plaintiffs below, had rested on the improvement of *Little* alone, and he had done no act to lessen his improvement right, we admit they might recover 440 acres; but from all the circumstances of the case, the legal presumption is, either that he intended to abandon the land in controversy, or to commit a fraud upon the Commonwealth. In 1786, he took out a warrant for 200 acres, and although a survey was subsequently made of 440 acres, he would not permit the surveyor to return it, but fraudulently kept it back, with a view to cover the whole 440 acres, until he could procure a settler on the lower part of the tract, and thus defraud the Commonwealth of interest on 240 acres,

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from the year 1774, the commencement of his improvement, and of the price for which land sold at that period. The conduct of *Little* was contrary to the spirit of the act of 8th April, 1785, sect. 9,(a) which declares, that unless a survey is made after the warrant comes into the hands of the deputy surveyor, it shall be void. The survey of 1795, was never returned to the surveyor general; it cannot therefore be considered as a survey on the warrant of 1786, and before the survey of 1812, the defendants had begun their improvements. It is clear that *Little* did not think he could hold the land in dispute, either by improvement, or by his 200 acre warrant. The clearing of the ten acre field, was no foundation for a warrant, because he never resided there, and though an assessor himself, he returned no more than 200 acres for taxation, from the year 1794, which was before the survey, until his death. One who makes a survey on an improvement right, cannot hold adjoining land, not included in the survey under the improvement. *Holmes v. Kay.*(b) Now though it is not contended that the circumstance of taking out a warrant for 200 acres, is, of itself, an abandonment of the rest, yet that, taken in connection with the other facts given in evidence, affords a legal presumption of an intent, either to abandon, or to defraud the Commonwealth, in either of which cases, the plaintiffs are not entitled to recover; and fraud, the Court are to infer as matter of law.

*Too*, for the defendants in error.

*John Little's* warrant for 200 acres, was laid on the land in dispute, and it was proved by the testimony of *Morrison*, that it answered the call of the warrant. It called too, for an improvement, which is satisfied by the ten acre field and the schoolhouse. In general, it is true that an improver is concluded by a warrant and survey; but it has never been held, that he is bound by a warrant without a survey, nor is the law so; and even a survey may be explained so as not to be conclusive. *Lessee of Davis v. Keefer.*(a) *Little* always claimed this land, but was mistaken in supposing that he could not hold 440 acres under his improvement; his boundaries, including the whole 440 acres, were marked upon the

(a) 2 Sm. L. 321.

(b) 2 Sm. L. 180.

(c) 4 Binn. 164.

ground, and were perfectly known to the neighbourhood, and the Commonwealth received interest on the whole quantity from the year 1774; the allegation of fraud, is therefore without foundation. If 440 acres had been returned on the warrant for 200 acres, it cannot be disputed that it would have been good, and there is no reason why the same quantity may not be recovered by two distinct warrants, founded on the same improvement. The circumstance of his having returned only 200 acres for taxation, cannot possibly affect the title to the land. Whether under all the circumstances of the case, it was to be inferred, that he intended to abandon the land in dispute, or had committed a fraud upon the Commonwealth, were questions of fact, very properly submitted to the jury.

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The opinion of the Court was delivered by

GIBSON J. *Little* had an improvement that entitled him to 440 acres, and it is conceded, that if he had rested on it, and done no act to lessen the extent of his claim, he would have been entitled to the land in dispute. In 1786, he took out a warrant for 200 acres to include his improvement, calling for the owners of the adjoining lands. In 1795, a survey of 439 acres and 14 perches was made by *Eaton*, a deputy of *Canon*, including the land in dispute. After this survey was made, *Little* told *Eaton*, not to return the draught, or write his name on it, till he procured a settler on the end in dispute, and then he would have to return two draughts. It is not known when this draught was returned to *Canon*, but he received his fees in 1805. The taking a warrant for, and having a survey made, of a less quantity than a settler is entitled to, but not returned, is not conclusive evidence of an intention to abandon the part not included; it is a circumstance to be left to the jury, and may be explained and rebutted. Whether the return of such survey would make any difference, is a question which at present we do not decide. Here *Little*, at a time when there was no interfering claim, had his pretensions designated by a survey; he had previously, it is true, taken a warrant for 200 acres, but this without a survey, excluding the surplus to which he otherwise would be entitled, was no waiver of his right. It is immaterial to the State, whether a settler obtains his quantity by more than one warrant, or not, provided he gets, on the whole, no

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more than he is entitled to, and honestly pays for what he gets. If therefore, he gives notice to the world, by a survey of his pretensions, that the land is not vacant, nobody can complain. I cannot consider the draught made in 1795, as a survey on the warrant of 1786, for the surveyor was desired at the time, not to return it, or write *Little's* name on it, as he intended to take out another warrant, when it would be necessary to return two surveys. It was in fact, a survey to circumscribe his claim as a settler, and we afterwards, in 1812, find this warrant surveyed on the land in dispute, as soon as the defendants had commenced their improvement. Whether there had been an abandonment or not, was a fact under all the circumstances of the case, fairly left to the jury; and in this part of the charge, it is clear there is no error.

But it is contended, that there is error on another ground. It is said, that *Little* intended to hold but 200 acres under his improvement and warrant of 1785, and that by his request to the surveyor not to return the draught until he could put another settler on the land in dispute; and obtain a warrant for it, he evinced an intention to defraud the State of interest on the purchase money, from his original improvement in 1774, to the commencement of his intended improvement, and that he meant to cover the land in the mean time, by his improvement right and survey, including the whole. Whatever his intention may have been, it is admitted the State has in fact been paid as much as she had a right to demand, and that if a fraud were intended, it was not effected. Whether a fraud intended, though not executed, would affect the title of the party, or whether he would have a *locus penitentiae*, and might retract before its consummation, is a question about which I have no doubt. A bare intention, which injures no one, can have no effect. The fact of fraud, was put to the jury as favourably for the plaintiff in error, as he could desire, or the law would warrant. The jury were instructed, that if they thought *Little* intended to defraud the Commonwealth, by putting a settler on, and not paying interest from the date of his original improvement, and *before he changed that intention*, a third party come in and acquired title, the plaintiff would not be entitled to recover. It is unnecessary to say, whether in this, the Judge erred in favour of the defendants; it is sufficient, that he went full far enough. On the facts, he delivered a pointed opinion

in favour of the plaintiffs ; but as it was given merely as opinion, and not as a direction binding on the judgment of the jury, it would not, even if wrong, be, on that ground, the subject of error. The judgment must be affirmed.

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Judgment affirmed.

LYON and others executors of LYON against ADAMS  
and others Commissioners of Cumberland county.

IN ERROR.

Monday,  
October 5.

WRIT of error to the Court of Common Pleas of Cumberland county.

This suit was brought by the executors of *William Lyon* deceased, who, from the year 1786 to the year 1809, held the offices of prothonotary, register, recorder, and clerk of the Orphans' Court of the county of *Cumberland* against *Thomas Adams*, *Isaiah Graham*, and *William Ely*, who at the commencement of the suit were commissioners of that county, to

Prothonotaries, registers, recorders, and clerks of the Orphans' Court, are not entitled to be paid by their respective counties for office rent or fuel, prior to the erection of the public offices, nor for fuel since their erection.

Prothonotaries are entitled to be paid by the county the expense of giving notice by public advertisement when the acts and journals of the assembly come into their hands, and also the price of the book in which receipts are directed to be taken from each person to whom they deliver a copy of the acts or journals ; but they are entitled to no other allowances in relation to this business.

Prothonotaries are entitled to no fees for receiving and filing the returns of district and general elections, and transmitting copies of the said returns to the secretary of the Commonwealth ; nor for performing the same services in relation to the election of President and Vice President of the United States ; nor for filing the oaths of the persons elected county commissioners, and making out and delivering to the persons so elected, certificates agreeably to law ; nor for entering the appointment of auditors for settling the public accounts of the county ; but they are entitled to fees for filing the reports of the auditors.

Prothonotaries are not entitled to any fees for entering the appointments of agents of the general election, for the different election districts ; but they are entitled to fees for giving notices under seal to the agents appointed.

Prothonotaries can not recover of the county, fees in suits brought on forfeited recognizances, at the time when the money recovered in such suits was to be paid into the treasury of the Commonwealth.

The law will not imply a promise to pay debts due from a county, by individuals, who, when the suit was brought, were county commissioners, but who were not so when the debts originated, and who had ceased to be so before the suit was tried.

*Query*, Whether county commissioners constitute a corporation liable to be sued ? If they do, the suit should be against the corporation, without naming the commissioners individually.

It seems, however, that the only remedy for the recovery of debts from a county, (in such case) is, by applying for a *mandamus* commanding the commissioners to draw an order on the county treasurer.

4 SR 443  
28 SC 99

1818. recover divers sums of money, alleged to be due from the county to their testator.  
*Chambersburg.*

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and others  
Commission-  
ers of Cum-  
berland coun-  
ty.

On the trial, six bills of exceptions were taken to the admission and rejection of testimony, from which the nature of the claims on which the suit was founded, will sufficiently appear. They were as follows:

*First bill of exceptions.* The plaintiffs' counsel offered to prove, that their testator in the year 1786, held the several offices of prothonotary, register, recorder, and clerk of the Orphans' Court of *Cumberland county*; that in the same year he erected at his own expense, a building, separate and distinct from his dwelling house, which was exclusively occupied in keeping the records and transacting the business appertaining to said offices from the month of *December*, 1790, until the month of *December*, 1803; that during that time he provided at his own expense, all fuel necessary for the said offices; and that since *December*, 1803, he had furnished all the fuel necessary for the public office, to which the records of his several offices were then removed.

The counsel for the defendants objected to the admission of the evidence offered, and the Court sustained the objection as to all evidence of the plaintiffs' testator having furnished an office or fuel previous to the month of *December*, 1803; but admitted evidence of fuel having been furnished for the public office from *December*, 1803, until *January*, 1809. The counsel for the plaintiffs excepted to the opinion of the Court, as to the testimony rejected, and the counsel for the defendants excepted to their opinion, as to the testimony admitted. It was admitted, that the public offices were not erected until the month of *December*, 1803.

*Second bill of exceptions.* The plaintiffs then offered to give in evidence, that their testator as prothonotary, had received the laws of *Pennsylvania* and of the *United States*; and had provided a book for taking receipts for the same, agreeably to law, from the year 1791, until the year 1808, inclusive.

The counsel for the defendants objected to evidence being given of these facts, and the Court sustained the objection, except as to the costs of advertising, and the price of the book for entering receipts, agreeably to the acts of assembly. Their opinion was excepted to by the plaintiffs' counsel, as to

the testimony rejected, and by the defendants' counsel as to 1818.  
the testimony admitted.

*Third bill of exceptions.* The plaintiffs then offered to prove, that their testator, as prothonotary, had received and filed the returns of district and general elections, and had transmitted copies of the said returns to the Secretary of the Supreme Executive Council, and to the Secretary of this Commonwealth, agreeably to the acts of assembly, from 1785 until 1808, inclusive.

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ty.

To the admission of evidence of these facts, the counsel for the defendants objected. The Court over-ruled the evidence, and the plaintiffs counsel excepted to their opinion.

*Fourth bill of exceptions.* The counsel for the plaintiffs then offered to prove, that their testator, as prothonotary, had received and filed the returns of the district and general elections of electors of President and Vice President of the *United States*, in the years 1792, 1796, 1800, 1804, and 1808, and had transmitted copies of said returns to the Secretary of *Pennsylvania* agreeably to law. And that he had filed the oath of each commissioner of *Cumberland* county elected from 1799, until 1808, inclusive, and made out and delivered to the persons so elected, certificates agreeably to law. And that he had entered the appointments of auditors, to settle the public accounts of *Cumberland* county, from 1791, until 1808, inclusive; and filed the reports of said auditors, from 1794, until 1808, inclusive. To all this testimony, the counsel for the defendants objected; and the Court refused to admit the evidence, except so far as it related to the filing of the reports of the auditors. The counsel for the plaintiffs, excepted to the opinion of the Court as it respected the testimony rejected, and the defendant's counsel excepted to it, as it respected the evidence admitted.

*Fifth bill of exceptions.* The counsel for the plaintiffs, then offered evidence to prove that their testator as Prothonotary, had entered the appointments of agents of the general election for the different election districts, in *Cumberland* county, and given notices under seal to the several agents appointed, from 1799, until 1802, inclusive. The Court over-ruled the evidence as to the entering the appointments of agents, and admitted it, as to the notices under seal. Their opinion was excepted to, by both the plaintiffs' and defendants' counsel.

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*Sixth bill of exceptions.* The counsel for the plaintiff then offered in evidence, the records of the Court of Common Pleas of Cumberland county, of all the suits mentioned in a certain statement. This statement contained a list of suits on forfeited recognisances, brought in the name of the Commonwealth, at a time when the sums recovered in such suits were paid into the treasury of the Commonwealth.

THE COURT, on an objection being made by the defendant's counsel, over-ruled the evidence offered, and an exception was taken to their opinion by the plaintiffs.

With a view to shew what had been the usage on the subject, the plaintiff's counsel, by consent, read a number of certificates of persons who had held the several offices above mentioned in different counties, and of county commissioners in different counties, tending to prove, that it had been usual to allow the fees claimed by the plaintiffs.

It was agreed, that on any judgment which might be entered in the suit, all questions which might arise should be taken up to the Supreme Court by writ of error, by either party, and if the Supreme Court should be of opinion, that the plaintiffs could recover in this action any of the items of their account, the amount of such items should be ascertained, and the judgment of the Supreme Court should be final, without any relation to the amount found by the verdict; and that the defendants would make no objection to the writ of error, on the ground of its being taken out by the plaintiffs to reverse their own judgment.

*Chambers and Watts*, for the plaintiffs in error.

*Metzgar*, for the defendants in error.

The opinion of the Court was delivered by

TILGHMAN C. J. Six exceptions were taken to the opinion of the Court below, which shall be considered in the order in which they stand in the record.

1. [Here the Chief Justice read the first bill of exceptions.] On the 27th March, 1790, an act was passed, to provide for the safety of the records of the several counties in the Commonwealth, by which the commissioners of each county were authorised, with the approbation of the Justices of the

Court of Quarter Sessions, and the grand jury, to erect 1818.  
 buildings for the safe-keeping of the records and papers be-  
 longing to the offices of the prothonotary of the County Court *Chambers-*  
 of Common Pleas, the clerk of the Court of Quarter Ses- *burg.*  
 sions, the clerk of the Orphans' Court, the recorder of deeds, *LYON*  
 and the register for the probate of wills, &c. ; and all the said *and others*  
 officers were directed, under the penalty of 200*l.* to deposit *executors of*  
 and keep all the records and papers belonging to their offices, *LYON*  
 in the said buildings, as soon as they should be erected. *v.*  
 And by the same law all the before-mentioned officers, and *ADAMS*  
 also the sheriff of each county, were directed, under the pe- *and others*  
 nalty of 200*l.* from and after the 1st *January*, 1791, to keep *Commission-*  
 their offices in the town or place established by law for hold- *ers of Cam-*  
 ing the Courts for each county. Before the making of this *berland coun-*  
 act, all the county officers had kept their offices in buildings *ty.*  
 provided by themselves, nor was there any law by which an  
 allowance was made to them either for office rent or for fuel.  
 The act of 27th *March*, 1790, was made, not for the benefit  
 of the officers, but for the public good ; for the preservation  
 of the records in which the county was interested. And  
 inasmuch as no allowance is made by that, or any other act,  
 either for office rent, until the public buildings should be  
 erected, or for fuel at any time, it is the opinion of the Court,  
 that the plaintiffs were not entitled to recover any thing, ei-  
 ther for office rent or for fuel.

2. [Here he read the second bill of exceptions.] The opi-  
 nion of the Court of Common Pleas was correct. The act of  
 6th *April*, 1802, directs the prothonotary to give notice, by  
 public advertisement, when the acts of assembly and jour-  
 nals come to his hands, and provides, that the county shall  
 pay the expense of such advertisement. The same act  
 directs the prothonotary to take a receipt from each person  
 to whom he shall deliver a copy of the acts or journals, in a  
 book to be prepared at the expense of the county. No other  
 allowance is made to the prothonotary on account of this  
 business, and therefore he is entitled to nothing more.

3. [Here his honour read the third bill of exceptions.] The  
 Court of Common Pleas were right in their opinion. There  
 is no law by which the claim of the plaintiffs can be sup-  
 ported.

4. [Here he read the fourth bill of exceptions.] In this  
 opinion also, we agree with the Court of Common Pleas.

1818. He that accepts a public office, takes it *cum onere*. For certain services fees are prescribed by law ; for certain other services it was not intended that fees should be paid. It is not true, that for *every service*, officers are entitled to a *quantum meruit*, although no fee is allowed by act of assembly ; but it is true, that *in some cases, sanctioned by long custom*, a *quantum meruit* was allowed, until forbidden by the present fee bill. These principles were laid down by this Court, in the cases of *Sheriff Irwin v. The Commissioners of Northumberland county*, 1 *Serg. & Rawle*, 505, and *Levy, prothonotary of Northumberland county v. The same Commissioners*, *ante*. 291.

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5. [Here he read the fifth bill of exceptions.] In this opinion, we perceive no error.

6. [Here he read the sixth bill of exceptions.] At the time when the suits were brought, in which these fees are charged, the sums recovered on forfeited recognisances, went into the treasury of the Commonwealth, and the actions were brought in the name of the Commonwealth. We can perceive no reason whatever, therefore, why the county should be charged. The opinion of the Court of Common Pleas was right.

But an objection is made, which strikes at the root of the plaintiffs' action. It is not pretended, that the defendants made a positive assumption to pay any of those fees. Will the law then imply a promise? The commissioners have no public funds in their hands. The money of the county is kept by the county treasurer, and the commissioners pay the county debts by orders drawn on him. But the defendants have no power to draw orders, because they have ceased to be commissioners. Nor does it appear, that they were commissioners at the time the services were performed for which the fees, claimed in this suit, are charged. It is impossible then, that the law can imply an assumption to charge them in their private capacities ; and yet as such, and in no other way will they be charged, if judgment goes against them in this suit. Their being named commissioners in the writ, is of no importance. They are not sued by any corporate name. If indeed the commissioners constitute a corporation liable to be sued, the suit should be against *the commissioners*, without naming them individually, and then the judgment would be entered in like manner. But we give no opinion, whether such a suit be maintainable. It would be attended with diffi-

culties. The commissioners not being intrusted with the funds of the county, on what could an execution be levied? Or what would be the benefit of a judgment against a corporation which has no property? The usual course has been, to apply to this Court for a *mandamus*, commanding the commissioners to draw an order on the treasurer. That certainly appears to be the plainest course; but without deciding, whether there be any other remedy, we only give our opinion at present, that this action cannot be supported.

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of Cumberland county.

DUNCAN J. having been concerned as counsel for the defendants in error, took no part in the decision.

### DUNCAN *against* The Commonwealth.

IN ERROR.

*Monday,*  
October 5.

WRIT of error to *Franklin* county.

*Matthew Duncan*, the defendant below, was convicted of adultery and bastardy, but before judgment, received a pardon from the governor for the *adultery*. Having pleaded his pardon, the Court allowed it, so far as regarded the punishment of adultery, but gave judgment against him for the costs. The Court likewise made an order, that the defendant should pay to the mother of the *two male bastard children*, twelve dollars for her lying-in expenses, and one hundred and eighty dollars for the expenses of maintaining the said children, from their birth, to the day of making the said order, and from that day, at the rate of forty-two cents a week for each of the children, until they should severally attain the age of seven years; and further, that the defendant should enter into a recognisance, himself in four hundred dollars, and one good surety in two hundred dollars, conditioned for the performance of the said order and judgment of the Court.

In an indictment for adultery, it is not necessary to state the township in which the defendant resided when the offence was committed.

Costs upon an indictment, are remitted by a pardon before judgment.

After a pardon of the crime of adultery, the Court may proceed to make an order for the maintenance of the bastard child which was the fruit of the adultery.

On the removal of the cause to this Court, three errors were assigned, which are stated in the opinion of the Court.

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*Clark and S. Riddle*, for the Commonwealth, relied on *Commonwealth v. Roberts.*(h) 5 *Bac. Ab.* 296. *Pardon. E.* 5 *Bac.* 287. act of 1705. sect. 8.(i) 1 *Sm. L.* 29. (note) 5 *Com. Dig.* 175. *Ludham v. Lopez.*(k) *Howel v. James.*(l) *Rex. v. Codrington.*(m) act of 1705.(n) 5 *Bac. Ab. Pard. P.* *Dr. Brinkendale's case.*(o) act of 20th April, 1795.(p) 2 *Hawk.* ch. 37. sect. 33, 34.

The opinion of the Court was delivered by

TILGHMAN C. J. It is assigned for error, 1st, "That the indictment is defective, in not mentioning the township in which the defendant resided, when the offence was committed." This is said to be necessary, because the fine for adultery is to be divided between the Commonwealth, and the supervisors of roads of the township. By the act of 31st March, 1772, the fine was to be divided between the governor, and the overseers of the poor of the township, where the offender resided at the time of committing the offence. But in the place of the overseers of the poor, the supervisors of roads were substituted, by the act for erecting a poor house in Franklin county, passed 11th March, 1807. It is not necessary, however, that the township should be laid in the indictment, because the Court may ascertain the place of the defendant's residence, otherwise than by the verdict of the jury. There is no error therefore in omitting it.

2. The second error assigned, is in the judgment for costs. It is contended on behalf of the Commonwealth, that the

- (a) *Pard. Ab.* 2.
- (b) *Read's Dig.* 236.
- (c) 3 *Car. & Bio.* 64.
- (d) 1 *Ld. Raym.* 214.
- (e) 2 *Ld. Raym.* 818.
- (f) 2 *Salk.* 458.
- (g) *Cro. Elis.* 632.
- (h) 2 *Dall.* 124.

- (i) 1 *Sm. L.* 27, 28.
- (k) 1 *Str.* 529.
- (l) 2 *Str.* 1272.
- (m) *Cro. Car.* 199.
- (n) 1 *Dall. L.* 47.
- (o) *Cro. Car.* 9.
- (p) *Pard. Ab.* 156.

right to the costs was vested in the officers to whom they were due, and therefore, the governor neither intended, nor had he power to remit them. If the right was vested in the officers, I agree that the Governor had no power to affect their right. But whether the right was vested, is the question. And I take it, that it was not vested before judgment, and when the defendant pleaded his pardon, judgment ought not to have been given. Thus is the law laid down in *Cro. Car.* 9. and 199, "Costs for which judgment has been given, are not remitted by a pardon of the offence, subsequent to the judgment, *because there was an interest vested in private persons.*"

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3. The third error assigned, is in the order respecting the support of the bastard children. This order is in the usual form, and the only question is, whether after pardon, the Court had a right to make it. Where there are several offences, the governor may pardon one, and not the other, and where the punishment is divided into distinct parts, he may remit a part. Bastardy cannot properly be called a different offence from adultery. The bastard is begotten in the act of adultery, and his birth is the consequence of it. But the punishment of adultery, and the order to maintain the child, are quite different things. A fine and imprisonment are inflicted as the punishment of the *crime*, the order for maintenance is intended for the enforcement of a moral duty, and the protection of the public from expense. There may be propriety therefore in remitting the *punishment*, when it would be improper to dispense with the *maintenance*. The pardon in question, is of the *adultery*, but no mention is made of the *expense of maintenance*; and they are things of so different a nature, that one cannot be said to be included in the other. The order for maintenance, is collateral to the judgment for adultery. The Court therefore might proceed to make the order, although they could not lawfully give the judgment. If the order were part of the judgment, the pardon would have stopt all further proceedings, nor perhaps, would it be in the power of this Court to reverse the judgment for costs, without reversing the order for maintenance, because it was decided, in the case of *Jackson v. The Commonwealth*, 2 Binn. 79, (where the defendant was sentenced on a conviction of adultery, to pay a fine of one hundred and fifty dollars, and to be imprisoned three months *at hard la-*

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bour,) that the judgment could not be reversed in part, and affirmed in part. I give no opinion, however, on this point, for it may deserve further consideration, whether, even in a criminal case, the judgment may not be reversed *as to costs*, and affirmed as to the rest, or *vice versa*. In the present case, I consider the order for maintenance, as altogether distinct from the judgment for costs, and am therefore of opinion, that the judgment for costs should be reversed, and the order for expenses and maintenance, affirmed.

Judgment for costs reversed, and  
order of maintenance affirmed.

### SHOEMAKER against MEYER.

Monday,  
October 5.

IN ERROR.

A rule of arbitration under the act of 20th March, 1810, is not vitiated by containing a submission of "all matters in variance between the parties in the cause," instead of "all matters in variance in the cause between the parties."

An award directing money to be paid by instalments, is void.

WRIT of error to Adams county, in an action of covenant brought by Jacob Meyer, the defendant in error, against John Shoemaker, to August term, 1813. On the 27th September, 1813, it was referred under the arbitration act of 20th March, 1810. The rule of arbitration, instead of the usual submission of "all matters in variance in the cause between the parties," contained a submission of "all matters in variance between the parties in the cause." The arbitrators met, and after having investigated the case, awarded to the plaintiff, the sum of 1365*l.* 12*s.* to be paid in twelve annual payments, commencing on the 1st April, 1815.

A rule was obtained on the 15th November, 1815, to show cause why this award should not be set aside, which was dismissed. The defendant took a writ of error.

Dobbin, for the plaintiff in error, contended, 1. That the arbitration act being in derogation of the common law, its provision should be strictly pursued; that the variance in the present instance, between the law and the submission was, not in language merely, but in substance, inasmuch as the submission comprehended all matters in variance between the

parties, whether they formed the subject of that suit or not, and the design of the law was to confine the jurisdiction of the arbitrators to those matters alone, for which the suit was brought. To sustain this award would be to give to the arbitrators a jurisdiction which by law they do not possess. He cited, *Kyd on Awards*, 98. *Tetter v. Rapsmyder*.(a) *Messinger v. Kintner*.(b) *Geyger v. Stoy*.(c)

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2. That the terms in which the rule was expressed, had begotten another error, which was fatal to the award. They were calculated to deceive the arbitrators, by making them suppose that they were competent to settle all disputes between the parties, and they had actually awarded the payment of a debt which was not due. This appeared from the award itself. The suit was brought to *August Term*, 1813, and the first instalment was directed to be paid on the 1st *April*, 1815.

*Cassat*, for the defendant in error, answered, that references, being calculated to compose differences ought not to be subjected to a nice criticism; that by a fair and liberal construction, this was a reference only of matters in variance in this particular suit; that the language of the rule was indeed capable of two constructions, but that which supported the proceedings ought to prevail; and that the act of 29th *March*, 1809,(d) authorised arbitrators to be chosen, "for the hearing and determining of all matters in variance between the parties in such suit or action," and yet it had never been supposed, that they could inquire into any thing but the matters in controversy in the suit in which they were appointed.

That although the first payment was directed to be made at a future day, it did not follow that the money was not due; and that in arbitrations out of Court, an award to pay money at a future day was good. *Booth v. Garnett*.(e) That the suit was brought for not giving security to pay money by instalments, according to articles of agreement, and the arbitrators having all the powers of judge and jury, had a right to do justice between the parties, as a court of chancery would do; and this Court would carry the substance of the award into effect by moulding it into proper form for judgment. *Richter v. Chamberlin*.(f)

(a) 1 *Dall.* 293.(b) 4 *Binn.* 3.(c) 1 *Dall.* 13(d) *Purd. Ab.* 9.(e) 2 *Str.* 1002.(f) 6 *Binn.* 34.

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In reply it was said, that the act of 1810, under which this suit was arbitrated, corrected the expressions of the act of 1809, and therefore the argument to be drawn from that act was against the opposite party.

The opinion of the Court was delivered by

GIBSON J. An exception is taken to the form of the rule of reference, which contains a submission of "all matters in variance between *the parties* in the cause," which it is said is a substantial variance from the provisions of the act which gives a reference of "all matters in *variance in the cause*, between the parties." However this critical nicety may stand as to references at common law, or under other acts of assembly, it is sufficient that the present exception was taken in *The administrators of Steigleman v. Wolfersberger*, decided at the last May Term, in Lancaster, in which it was not sustained.

But a more substantial objection to this award is, that the arbitrators have awarded the damages to be paid by instalments. The report, if unappealed from for twenty days, becomes a judgment, without any act of the Court to be done previous to execution. The award itself is a judgment. The arbitrators possess precisely the same powers that the Court and jury do, and must exercise it in the same manner; for an appeal is given to the Court, where the cause is to be tried in the usual manner, and it would be absurd to suppose the inferior tribunal had power greater than the superior, or different either in extent or the manner of exercising it. The defendant objects, that from the face of the award it appears the plaintiff brought his suit before any thing was due; and it is answered, that as no declaration was filed it is impossible to say what kind of case was laid before the arbitrators, and that on the authority of *Richter v. Chamberlin*, an award will be supported on the presumption, that a cause of action was laid before the arbitrators sufficient to justify the award, if such a cause of action might in anywise have existed. Hence it is contended, that the breach for which damages were given may have been, and in fact was, (although it does not appear from the record,) the refusal of the defendant to execute a mortgage to secure the payment of the sums, at the several times stated in the award. Supposing it to be so; the question is, what verdict could a jury give for a breach

so assigned. Before the stat. 8 and 9 W. 3 even in an action of debt for a penalty for the breach of covenants to be performed at different times, or monies to be paid by instalments, the verdict and judgment were for a gross sum, and the plaintiff took out execution for the whole; for a plaintiff could assign only one breach, and if he assigned several, the declaration was bad for duplicity, one breach being a forfeiture of the whole penalty. It is a general principle, that where there is but one breach, the damages must be entire. Our act of assembly, which, in substance, follows the English, statutes like it relates to penalties, and has nothing to do with actions of covenant, in which the plaintiff may assign as many breaches as he is able to prove. But even in that case, the damages are recoverable *immediately*, and there is judgment accordingly. I know not any case in which a Court would render judgment on a verdict for damages payable by instalments. Even on debt for a penalty, the judgment is for the whole penalty, as a *personal* debt, although the Court having a controul over the execution, permits the instalments to be recovered separately as they fall due. Now here the case put by the plaintiff's counsel, on which it is said this award may be supported was, that of a single breach of covenant, in not executing a mortgage to secure payments to be made at future periods, and not even separate breaches for the non-payment of the money; for in the latter case the defendant's objection, that the suit was brought too soon, would be unanswerable. The breach being entire, the damages must be so too. But it is said, that the award is for a gross sum, and that the paying by instalments may be rejected as surplusage. This would be to take an unwarrantable liberty with the intention of the arbitrators. The manner of payment was a substantial consideration in making up their award, and by rejecting it we would subvert their whole intention. Nor can we support this award on the ground that a court of chancery would decree a specific execution of the contract, and that the arbitrators have done so substantially, by giving the lien of a judgment for securing the payment of the same sums and at the same times for the securing of which a mortgage ought to have been given. In this State, the Courts, (though clothed with chancery powers,) from the very nature of the common law forms of proceeding to which they are restricted, cannot give relief in many cases

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1818. in which chancery would afford it. In an action of covenant, damages alone can be obtained, and by this means it is impossible to enforce a specific execution of the contract.

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*Martin.*

Judgment reversed.

| *HALL and others against POWEL.*

*Monday,*  
*October 5.*

IN ERROR.

Where the courses and distances expressed in a return of survey differ from the natural and artificial boundaries on the ground, the latter are to prevail; unless land has been intentionally thrown out, which is a fact for the jury to decide.

If a lease be, "of all that tract of land, situate, &c. supposed to contain — acres, more or less, now in the occupancy of A B," and A B occupy more land than the quantity expressed, lying on both sides of a line afterwards in dispute with his lessor, it is a lease of all that he is in possession of.

If the rightful owner of a tract of land is

in actual possession of a part, he is in constructive and legal possession of the whole, unless he is actually dispossessed; but if a man enter wrongfully into the possession of another, his possession does not extend beyond his actual enclosures and improvements, and the statute of limitations will protect no other possession.

THIS case came before the Court on a writ of error to the Common Pleas of *Huntingdon* county. The opinion of the Court below was filed agreeably to the act of assembly, and came up with the record.

It was an ejectment brought by the defendant in error, *John H. Powel*, against *Thomas Hall*, *Jacob Taylor*, and *Elijah Corbin*, to recover a body of lands which he claimed under five warrants, of various dates, in the name of *Henry Boquet*, on which surveys were made and patents issued. The title was regularly deduced to the plaintiff, and it was conceded, that it was indisputable for whatever extent of land was embraced by it. The controversy was, whether the title covered the land in dispute. It was admitted by the defendants, that certain lines were run and marked on the ground, but they contended, that the surveyor, afterwards, intentionally varied from those lines, and returned the surveys differently, and that the plaintiff was not entitled to recover beyond the lines and courses expressed in his return of survey and patent. Much evidence was given at the trial, of which it is necessary to state only a small part. It appeared, that to *April* Term, 1800, ejectments had been brought by *Elizabeth Powel*, under whom the plaintiff claimed, against *Thomas*, *William*, and *Nathan Hall*, who were settled on one or more of the surveys, and against *James Brown*, who was also settled on one of the surveys. In the following *May*,

judgments were entered against the defendants, who agreed 1818. to take leases from the plaintiff. The lease to the *Halls*, *Chambersburg*, which was dated *May 27*, 1800, and was renewed in 1803, was of "that certain plantation, situated on the waters of *Big Trough Creek*, in *Union township*, containing about two hundred and thirty acres, be the same more or less, now in the possession of *Thomas Hall*." *Thomas Hall* and his brothers, for whom he was authorised to act in relation to the lease, were in possession of land on both sides of the disputed line. The lease to *Brown* was dated *June 2d*, 1800, and was for "all that certain plantation or part of a tract of land, situate on *Big Trough Creek* waters, supposed to contain about twenty acres, more or less, now in the occupancy of the said *James Brown*." *Brown*, also, was in possession of land on both sides of the disputed line. About twenty acres were admitted to be within the plaintiff's survey, but his house and more than twenty acres of land, were on the other side of the line.

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The President of the Court of Common Pleas, (WALKER,) in charging the jury, laid down the law involved in the case, in the following manner.

1. "That if a surveyor marks corners and lines on the ground, and makes a return calling for some of them, it is to be presumed, that he returns by the marked lines and corners, for otherwise he would deceive his employers. If the surveyor had intended to cut off land, why not call for posts? If he had, there would have been no difficulty; but his leaving out land and yet calling for the marked corners, is a gross fraud, if he left out any land included in such lines.

2. "That where lines and corners are to be found on the ground they cannot be departed from, though there may be some variance in the courses; and if the waters are found to agree with the lines and corners returned, this is strong evidence of a survey actually made.

3. "It is an invariable rule, that where two corners are established, the course is to be disregarded, especially in a closing line. By taking this course and running from the post to the white oak, the course is varied, and the distance; but you preserve all the courses and lines except one.

4. "If a lease be given for a tract more or less, and there is at the time, more than the quantity, and the party occupies land on both sides of the line disputed, under the lease, unless



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the lease specifies, or unless it is proved, that a part was excepted, it must be considered as a lease of the whole, and the lessee must give up the whole.

5. "Where a man claims by improvement adversely, and has not his pretensions marked out by lines or a survey, he is only protected, (by the act of limitations,) as far as is covered by houses, and fields, and actual possession."

*Burnside*, for the plaintiffs in error.

1. The charge of the Court below, in laying down the law in general and unqualified terms, that courses and distances were to be disregarded, where there were marked lines and corners on the ground, and that the rule was, invariably to adhere to those lines and corners, stated it much too broadly, and intrenched upon the province of the jury, whose business it was to decide, whether or not part of the land was intentionally thrown out. As respects this case, the law was certainly erroneously stated, for according to the plaintiff's claim, every line in the survey was changed. The surveyor was not bound, as the Court declare, to return all the land within the marked lines, when the warrant was for 200 acres and the lines included 400 acres. So far from being a fraud on the warrantee to neglect to do so, to have done so, would clearly have been a fraud on the Commonwealth, and in direct violation of the order, made before the return of this survey, not to return more than ten per cent. The lines expressed in the return of survey and the patent, designated and limited the plaintiff's title, and he is bound by them. That such is the law may be collected from several cases decided in this Court. *Lessee of M<sup>r</sup> Rhea v. Plummer.*(a) *Morris v. Thomas.*(b) *Lessee of Davis v. Butterbach.*(c) *Lessee of Duncan v. Curry.*(d)

2. It was also error to say, as applied to this case, that a lease of a tract of land of 20 acres, more or less, includes the whole tract, unless some part is particularly excepted. *Brown* had more than 20 acres, with his house, lying out of the disputed line, and about 20 acres more, within that line. The latter was evidently the land intended to be leased, and this the jury should have been permitted to pass upon.

(a) 1 *Binn.* 227.

(b) 5 *Binn.* 77.

(c) 2 *Yeates*, 212.

(d) 3 *Binn.* 21.

3. But the most important error committed by the Court of Common Pleas, was in that part of their opinion which confines the protection of the act of limitations to land actually included within inclosures. Entry with a view to settlement, lays the foundation of a title greatly favoured in *Pennsylvania*, and gives an inceptive right to the whole tract. Woodland is absolutely necessary to the enjoyment of that which is cleared, and a person holding the cleared land as an improver, is considered to be in actual possession of the adjoining woodland used by him, and may support trespass for it. The entry, therefore, of a man who has no title, is an ouster of the owner from the whole tract. At all events, what was the extent of the defendant's possession, and whether or not it was adverse, ought to have been left to the jury. He cited *Vandyck v. Van Beuren*.(a) *Jackson v. Bowen*.(b) *Jackson v. Vedder*.(c) *Stuyvesant v. Dunham*.(d)

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*Tod* and *Thompson*, for the defendant in error.

The defendants below were perfectly aware, that they were settling on patented land. The plaintiff, and those under whom he claimed, had always paid the taxes, and the marked lines were doubtless known. In 1800, ejectments were brought against the tenants, who, after having taken the advice of counsel, confessed judgments and took leases. There was then no dispute about lines; the marked lines were then considered by all as the boundaries.

That the law was correctly laid down in relation to the first point, does not admit of a doubt. The natural and artificial marks upon the ground have always prevailed; the return of survey being no more than evidence of the appropriation of the land, liable to be controuled by the actual survey. All the land, therefore, within the marked lines, will pass to the grantee, by a deed. So the law was laid down in *The lessee of Toder v. Fleming*.(e) where it was treated as a point completely determined by a variety of judicial decisions. Nor is it in any manner shaken by the case of *M'Rhea v. Plummer*, in which the point decided was, that in making a new survey which is bounded by an old one, it is not necessary, a second time, to mark the lines of the old survey; or

(a) 1 *Caines*, 90.

(b) 1 *Caines*, 358.

(c) 3 *Johns*. 8.

(d) 9 *Johns*. 63.

(e) 2 *Yeates*, 311.

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by any of the cases cited on the opposite side. The same rule, a rule founded in certainty and convenience, prevails in several other states. *Shaw v. Clements.*(a) *Herbert v. Wise.*(b) *Bastin v. Christie.*(c) *Smith v. Murphy.*(d) *Baker v. Lessee of Glascock.*(e)

With respect to the act of limitations, it was of no consequence whether the charge was right or wrong, because the jury were of opinion, that there was no adverse possession for twenty-one years, even of the defendant's houses and enclosed lands. But if it be of importance, the charge was right. The return of survey and patent gave a constructive possession, which continues as to every part of the tract not in the actual possession of another. The question is, what is an adverse possession, within the meaning of the act of limitations? In *New York*, several decisions have restrained the title by possession to the true grounds. He who claims by adverse possession, must shew by strict proof, that he entered adversely, and has continued to hold under a hostile claim. An enclosure by a possession fence, made by felling trees and making them lap over one another, will not take away the owner's right of entry after twenty years. There must be a real, substantial enclosure, an occupancy, a *possessio pedis*, definite, actual, and positive, to constitute such an adverse possession as will countervail a legal title. *Brandt v. Ogden.*(f) *Jackson v. Schoonmaker.*(g) *Jackson v. Gansevoort.*(h) In the present case, the possession was not adverse; it was with the full knowledge of the plaintiff's title and boundaries. The defendants never entered with a view to gain a title by improvement. On the contrary, they expressly recognised the plaintiff's title, by taking leases and confessing judgments, and these leases unquestionably comprehended all the land held by them. They were so expressed; they were for plantations containing so many acres, more or less, in the occupancy of the lessees, and must be construed to embrace all the land held by them, without regard to any particular number of acres.

(a) 1 Call. 438.

(b) 3 Call. 242.

(c) Taylor, 116.

(d) Taylor, 303.

(e) 1 Hen. & Munf. 177.

(f) 1 Johns. 158.

(g) 2 Johns. 234. 4 Johns. 390. S. C.

(h) 3 Johns. Cas. 109.

The opinion of the Court was delivered by

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DUNCAN J. The President of the Court of Common Pleas, *Chambersburg*.  
 having filed of record the charge of the Court, under the  
 act of assembly, it is brought up for revision by this Court,  
 and the errors in law now assigned, are, 1st. That the Court  
 erred in stating it to be a matter of law, "that if a surveyor  
 marks corners and lines on the ground, and makes a return,  
 calling for some of them, it is to be presumed, that he re-  
 turns by the marked lines and corners; for otherwise he  
 would deceive his employers. If the surveyor intended to  
 cut off land, why not call for posts? if he had, there would  
 have been no difficulty; but his leaving out land, and yet  
 calling for the marked corners, is a gross fraud, if he left out  
 any land included in such lines." In this State, the natural  
 and artificial boundaries, the monuments described as the  
 boundaries and limits of a survey, in general form the only  
 evidence of a survey. To these limits, thus returned, the  
 survey extends, whatever may be the courses and distan-  
 ces expressed in such return; and this is the common law of  
 the land. If unbroken usage, and a uniform course of judi-  
 cial decisions can make the law, then this was properly de-  
 cided by the Court, to be a general rule of property. On  
 this head, I shall content myself with referring only to one  
 decision of the Court. *Mageehan v. Lessee of Adams*, 2 Binn.  
 109. A survey and patent of one *Conrad*, which were given  
 in evidence, called for, as the place of beginning, a black oak  
 on the State line, thence by the same 130 perches, to a post.  
 The plaintiff below, offered to prove that the black oak, and  
 the marked line run from the black oak, were not on the State  
 line, but about 30 perches east of it, and the evidence was  
 admitted, and the plaintiff recovered according to the marked  
 line. The judgment was affirmed by the unanimous opinion  
 of the Court, who stated that this had been so settled many  
 times. This is not peculiar to *Pennsylvania*. In *Massachu-*  
*setts*, the same rule prevails. *Howe et al. v. Bass*. 2 *Mass.*  
*Rep.* 380. The Court there consider it as an established rule  
 of construction, that where a deed describes lands by its ad-  
 measurement, and at the same time by known and visible  
 monuments, the latter shall prevail; and declare that it had  
 been long and invariably held, that in case of a variance in  
 the description of land, between the monuments and the length  
 of lines, the former are to govern, and that, without any re-

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lation to the quantity. The corner trees here are the visible bounding trees, and allowed land marks, which, by our laws, to remove, is made an indictable offence.

Second error assigned. The Court state the law to be, "that where lines and corners are to be found on the ground, they cannot be departed from, though there may be some variance in the courses, and if the waters are found to agree with the lines and corners returned, this is strong evidence of a survey actually made." So has the law ever been held. The question has been frequently agitated, and is now put at rest. The field notes, the original plots made by the surveyor, the survey returned, and the patent, are only evidence of the survey. The real survey, the primary evidence, is, the marks on the ground. In *Toder v. Fleming*, before SHIPPEN and YEATES, Justices, at *Nisi Prius*, at *Lewistown*, 1798, 2 Sm. L. 256, the question occurred, whether the pretensions of a party should be determined by the courses and distances expressed in the return of survey, or by the marked trees, and lines actually run; and thus was the law laid down by these Judges, whose experience in questions of this nature, was greater than that of any men now living. "The natural or artificial boundaries of a survey, have uniformly prevailed, and there is absolute certainty, when a right line is followed from one corner to another; but the best instruments will vary in some small degree. For the sake of public convenience, and individual safety, all the lands comprised within certain marked lines, or proceeding from marked and known corners, will pass in a deed. Any surplus measure, or variation in the courses and distances, will not vitiate the instrument. The lines actually run on the ground, are the true survey and appropriation of the land contracted for; but the return of survey is only evidence thereof, and shall be controlled by the actual survey. This point had been frequently determined, and particularly in *Walker v. Furry & Krehl*, before Ch. J. McKEAN, in 1790.

The third error assigned, is, in the Court stating to the jury as an invariable rule, that where two corners are established, the course is to be disregarded. As a general rule, this is admitted by the counsel of the plaintiffs in error. It is contended, that it is stated in too broad terms, and is not without exception. But the Court have qualified the general expression of the invariable nature of the rule; for they

proceed to state, "especially in a closing line;" (and applying the rule to the closing line here,) "by taking this course, and running from the post to the white oak, the course is varied, and the distance; but all the lines and corners except one, are preserved;" and this was precisely decided, in *Yoder v. Fleming*. 1818. *Chambersburg*.  


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The counsel for the defendants below, on the trial contended, that the surveyor, after he had calculated the whole contents, found he could not return the whole, as the surplus would exceed ten per cent, and therefore he threw out a part, fairly and intentionally. The fact of throwing out a part, was left to the jury; "you will decide, whether the surveyor did not return the survey on the exterior lines;" and towards the close of the charge, on a suggestion from the counsel of the plaintiffs in error, it is repeated, that this fact is submitted to the jury.

How it arose, that the plot of the deputy who made the survey returned to his principal, varies in one course  $55\frac{1}{2}$  degrees east, from the marks on the ground, it is difficult to account for. It could not be, that he intended to return the whole block of surveys by an open line, for he has returned them by the marked line and marked boundaries. It could not be that he intended to disregard the whole of the marked exterior line, because the corners of that exterior line are made the boundaries of the survey returned; because they are made by him to represent the exterior line of the survey. It could not be, that he intended to throw off the triangular piece of about 11 acres, in obedience to his instructions not to return more than ten per cent surplus, for he would still leave a surplus, if that was his guide, which he could not return on the other six warrants. It could not be thought he intended to change the whole surveys, because he refers to the marked boundary; because the waters are laid down as they actually run, on the surveys marked on the ground; and because it would include part of the land he secured for himself on that same day, and which he returned. But however this was, all this was left to the jury, who have found the fact, that the surveys of defendant in error, did include the lands in dispute, and that the surveyor did restrain them to the exterior line, and that no part of the original survey was thrown out. The extent of the survey was a fact, and as such was left to, and has been found by the jury. If

1818. the jury erred, this Court cannot rectify the error, *Werdman v. Felmlly*, 6 Binn. 39.  
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It is again alleged as error, that the Court laid down the law, "that if a lease is given for a tract, more or less, and there is at the time more than the quantity, and the party occupies lands on both sides of the disputed line, under the lease, unless the lease specifies, or unless it is proved that a part was excepted, it must be considered as a lease of the whole." This will be considered with respect to *Hall's* lease, and then to *Brown's*. *Elizabeth Powell*, under whom *J. H. Powell*, the plaintiff in error, claims, the then proprietor, to *April Term*, 1800, brought an ejectment against the *Halls*. This was four years before the survey made under the direction of *John Canon*, and certainly for all the lands within the survey. *May 28th*, 1800, judgment;—*Thomas Hall* having taken a lease for himself and brothers. The lease is, "of that certain plantation situated on the waters of *Big Trough Creek*, in *Union township*, containing about 230 acres, be the same more or less, now in possession of *Thomas Hall*." This is not a lease of any particular number of acres, by the acre, but of the tract *in solido*, in his possession; a lease in bulk; the tract of land in his possession, whatever it may contain. To the same term an ejectment is brought against *James Brown*, by *Elizabeth Powell*, and on *2d June*, 1800, judgment against defendants for costs; defendants having taken a lease. The lease is dated *2d June*, 1800, and is "for all that certain plantation, or part of a tract of land, situated on *Big Trough Creek* waters, supposed to contain about 20 acres, more or less, now in the occupancy of the said *James Brown*." What is the extent of this demise? All that *Brown* was in the occupancy of; all that certain plantation, or part of a tract, or whatever the quantity might be; they knew not how much of the plantation he was in possession of; they supposed it about 20 acres, but whether it was more or less, whatever was in his possession, he leased.

The description in the lease is not of quantity, but of occupancy. The plantation, the part of the tract in his occupancy, is the description; the quantity is not ascertained, nor intended to be ascertained by the number of acres; its boundaries and limits, are *Brown's* occupancy, supposed to contain about 20 acres more or less. It is any thing else than a lease of a certain number of acres; it is uncertain of itself

supposed, about, more or less, and must be rendered certain by some other matter referred to in the lease ; that matter is the occupancy, which is the only limit and bound of the lease ; it is thus rendered certain. In investigating the judicial construction of any written instrument, reference must be had to the subject matter ; the subject matter of the lease is, that certain plantation, or part of a tract of land, then in the occupancy of *James Brown* ; all the lands in that tract of land, in the occupancy of *Brown*, whatever might be the quantity. If the jury found this land to be in the survey, plantation, or tract of land of *Mrs. Powel*, and *Brown* to be in possession in 1800, (as is here contended by the plaintiffs in error,) then it was leased, and *Brown* became the tenant of *Mrs. Powel*. The qualification of the legal import of the words used in the lease, would be, if at the time of the execution of the lease, a part was excepted, and then it would be otherwise ; then the terms would be explained and restricted, and thus it is qualified in the opinion delivered. If this be so, then no question of limits could arise, because there was no adverse possession.

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But further error is alleged. As it respects the operation of the act of limitations, every decision, every construction on the law, is most important, for it extends to every part of the State, and embraces the rights and possession of every man. *John H. Powel*, or those under whom he claims, was in possession of a part. This is admitted by the plaintiffs in error, for *Brown* and *Hall* were his tenants, of whatever they leased, be it more or less, during the time in which the limitation would run. As they entered originally, without colour of title, on the deeded lands of the defendant in error, they were disseisors ; for a survey puts the owner in possession. Their seisin then could extend no further than their actual, exclusive, occupation and possession ; for the acts of a wrong doer must be construed strictly, because he claims a benefit from his own wrong. There would appear to be no clearer principle of reason and of justice, than this, that if the rightful owner is in the actual occupancy of a part of his tract by himself, or tenant, he is in the constructive and legal possession, and seisin of the whole, unless he is disseised by actual occupation and dispossession. If this were not the law, the possessor by wrong, would be more favoured than the rightful posses-

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sor. Here are two, each in actual possession and occupation of part of a surveyed tract, the owner, and an intruder. Who then is in possession of the part not occupied by inclosure by either? The man who has no right but by disseisin of a part, or he, who is in the actual occupancy of a part, and the rightful owner of the whole? In this kind of mixed constructive possession, the legal seisin is according to the title. Title draws possession to the owner. It remains, until he is dispossessed, and then no further than actual dispossession by a trespasser, who cannot acquire a constructive possession, which always remains with the *title*.

The plaintiffs in error have no just cause to complain of the charge of the Court as to this act. Where a man claiming by improvement enters on the land of *another*, and has not his pretensions marked out by lines or a survey, he is only protected so far as is covered by his buildings and improvements, if there is neither survey made, nor lines, nor boundaries of such improvement. His seisin and possession do not extend beyond his actual occupancy by inclosure, and exclusive possession; it is difficult to conceive how the protection by limitation could extend further, and protect possession which only exists in the imagination and mind of the improver, and has assumed no visible, notorious, corporeal, tangible substance.

One enters on a corner of three tracts owned by *different* persons; if his constructive possession extends, as has been contended, to all that a legal settlement on the vacant lands of the Commonwealth would entitle such settler to, and has not defined his boundaries by notorious and visible marks, by some positive possession, which of these tracts will his constructive possession embrace? which of these owners is to lose his land by the bar arising from the limitation? The election would remain with the trespasser. He might set his heart on the whole of any one of these tracts, or take a part of the three, and thus a man be disseised of his land by an adverse possession, of which the utmost circumspection can give no notice by a notorious possession, which did not exist in fact.

The Court wish to be understood as not giving any opinion, how far one entering on the lands of another, without official right, but merely claiming by right of possession, is protected by limitation beyond his actual inclosures, though he has lines run or a survey made, and his boundaries as-

certained. The plaintiffs in error have not supported any of 1818. the objections to the opinion filed, and judgment must, therefore, be affirmed. *Chambers-burg.*

Judgment affirmed.

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II GRAHAM and another *against* MOORE and others.

IN ERROR.

Monday,  
October 12.

ON a writ of error to the Court of Common Pleas of Cumberland county it appeared, that this was an ejectment brought by *John Moore and others* against *William Graham* and *Samuel Eccles*, to recover possession of a tract of land containing 129 acres 150 perches, situate in *Middleton* township. The plaintiffs below claimed under a warrant to *James Moore*, for 50 acres, adjoining his other land and *Walter Deany* in *Middleton* township, *Cumberland* county, dated *June 9th, 1763*, on which they alleged a survey had been made by *John Armstrong*, deputy surveyor, the draft of which was burnt among his official papers, when his house was destroyed by fire in the month of *November, 1763*. In support of this allegation, they gave evidence of several surveys as early as the year 1766, calling for the land in dispute as surveyed land. They also gave evidence, that the said *James Moore* held another tract of land on which were a mill and valuable improvements, surveyed in the year 1766, by virtue of a warrant granted in 1751. This tract contained 567 acres, and was contiguous to the land in dispute. They further gave evidence, that *William Graham*, one of the defendants, a relation of *William Moore* deceased, who claimed

The Court are not bound to answer an abstract question, without applying the general principle of law to the case before the jury, and making such observations and distinctions as they may deem necessary. A warrant dated in 1763, and totally abandoned until 1812, may give no right; but it may give a perfect right, if it has been followed up in a reasonable time by a survey, which has been destroyed without the fault of the warrantee; or it may give a right even

without a survey, if it describe the land with reasonable certainty, and the warrantee has taken possession under it, designated the boundaries in such a manner as to be well known to the neighbours, and retained a continued possession until the time of his survey in 1812.

If the proprietor of a surveyed tract, passes over his line and cuts wood on the vacant land of the Commonwealth, he not only acquires no title to the vacant land, but is to be considered as a trespasser. If, however, he has enclosed the land, he may defend his possession against an intruder, without right; for where both are trespassers, *potior est conditio defendentis*.

The draft of a deputy surveyor is only *prima facie* evidence of the situation of an adjoining tract, for which it calls as a boundary.

A tenant, who endeavours to deprive his landlord of the benefit of possession, under a fraudulent pretence of giving it up, is still to be considered as a tenant, and cannot defend himself against his landlord in an ejectment, brought to recover possession.

A person who comes into possession under a tenant, is in no better condition than the tenant himself, and cannot defend his possession against the landlord.

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both the above-mentioned tracts by a title derived from the said *James Moore* his father, was placed by the said *William Moore*, as a tenant on that part of the larger tract which was adjoining to the land in dispute. *Graham* cleared land over the dividing line of the two tracts, and having lived many years on the larger, he removed to a house built on the land in dispute, where he remained a long time as the tenant of *William Moore* during his life, and of the plaintiffs who claimed under him, after his death. At length *Graham*, considering the land in dispute as *vacant*, because, as he supposed no survey had been made on *James Moore's* 50 acre warrant, and because, as he also supposed, the warrant did not call for the land in dispute, took out a warrant on the 3d *February*, 1812, and on the 15th of the same month laid it on the land. The plaintiffs entered a *caveat* against the survey on this warrant, and the parties were heard before the board of property, who decided in favour of the plaintiffs. In consequence of this decision, a survey was made and returned for the plaintiffs in the year 1812, by virtue of which they now claimed.

Some time before this suit was brought *Graham* gave notice to the plaintiffs, that he would give up to them the possession of the land which he held as their tenant, and it was contended on the trial, that he had given it up. On the other hand the plaintiffs denied that he had surrendered the possession, and insisted that instead of doing so, he had moved the fence, so as to throw his house out of the enclosed land, which he had occupied as the tenant of the plaintiffs, and retained possession of the house, alleging that it stood on vacant land.

The defendants gave evidence tending to shew, that the land in dispute was not the land called for by *James Moore's* 50 acre warrant; and that *James Moore* had claimed other land by virtue of that warrant, and they relied much on the survey of *Moore's* larger tract, which they contended called for land lying in a different place from that now claimed by the plaintiffs.

*Samuel Eccles*, the other defendant, came in under *Graham*.

The Court were requested, by the defendants' counsel, to charge the jury on the following points.

*First point.* That a warrant dated *June* 9th, 1763, on

which no survey has been made until the 17th *September*, 1818. 1812, gives no right against a warrant dated *February 8d*, *Chambersburg*, 1812, and surveyed on the 15th *February*, 1812.

*Answer.* In the abstract, and without reference to this cause, this question might be answered in the negative. But we think a warrant reasonably descriptive of the land, if it was early followed up by a survey, which has been destroyed without the fault of the warrantee, and of which the defendants had notice, would support this ejectment. If, however, the fact of a survey, which is submitted to the jury, should not be established, we think the ejectment may be supported, if the warrant was followed by quiet and undisturbed possession, particularly if the land was in the occupancy of the defendants as the tenants of *William Moore*, and after his death, of the plaintiffs, who claim under him; and if it was designated by surrounding surveys, calling for it as the land of *Moore*.

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*Second point.* That a tenant clearing over the patent line of his landlord, on the vacant land of the Commonwealth, can gain no right to such land.

*Answer.* A tenant clearing over a patent line, accidentally, or by the direction of his landlord, into the vacant land of the Commonwealth, in itself and unattended by other circumstances, would not acquire any right to such land; perhaps, if a part were enclosed and reduced absolutely into possession, it might be defended against an intruder without right.

*Third point.* That the words, "the other land of *James Moore*," marked on the outside of the diagram of the survey made in 1676, on *James Moore's* warrant of 1751, is such a designation of the land then claimed by *James Moore*, in right of warrant of the 9th *June*, 1763, as binds him to that particular place, and that the proprietaries and the Commonwealth were at liberty to grant any other land than that so marked on *James Moore's* survey, to any other person.

*Answer.* We cannot say such evidence would be conclusive, as one of the boundaries of the survey touches the claim of the plaintiffs. Whether the warrant is descriptive or not, and whether the land is called for by it, are submitted as far as they are material, with the remarks of the counsel respectively, to the attentive consideration of the jury.

*Fourth point.* That a tenant, after having delivered up possession of the land, agreeably to his lease, is no longer a te-

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nant; but has a right to enter upon the land and maintain any right he may have acquired, either by descent or by purchase from a stranger.

*Answer.* A tenant, who has fairly delivered up possession of the demised premises, by quitting the same, and notifying his landlord thereof, can no longer be considered in the relation of a tenant. But if, with a fraudulent intent, he gives such notice, and in contravention thereof holds possession, and builds a house within the actual enclosures occupied by him as tenant; if he has never removed from the premises, and has declared he never would, until compelled, he cannot defend himself as a stranger, nor prevent, by any pretence, under such circumstances, his landlord from regaining possession.

*Fifth point.* That *William Graham, jun.* not being a tenant, had a right before the 15th February, 1812, to enter upon the vacant land of the Commonwealth, and improve the same, and continue that improvement with intent to consummate his title.

*Answer.* The Court has no evidence in this cause, of his right, if he has any, further than that the defendants, by an admission of their counsel, were in possession. The name of *William Graham, jun.* is not mentioned by any witness in the cause, nor any title given in evidence under which he claimed. If in possession by, or under *Eccles*, he must be considered as an intruder, and with the warrant and continued possession for more than twenty-one years, with the lines ascertained in the manner herein-before stated, a re-survey under the direction of the board of property, would, against such a person, support the ejectment.

The defendant's counsel excepted to the opinion of the Court, and on the removal of the cause to the Supreme Court, it was argued by *Metzgar* and *Watts*, for the plaintiffs in error, and by

*Mahon* and *Carothers*, for the defendants in error. They cited *Lowry v. Gibson*. (a) *Kyle's lessee v. White*. (b) *Steinmetz v. Young*. (c) *Jackson v. Dobbin*. (d) *Merchant v. Milison*. (e)

(a) 2 Sm. L. 152, 3.

(b) 2 Sm. L. 165. 1 Binn. 246. S. C.

(c) 2 Sm. L. 166. 2 Binn. 523. S. C.

(d) 3 Johns. 223.

(e) 2 Sm. L. 165. 3 Yeates, 73. S. C.

TILGHMAN C. J. after briefly stating the case, and reading the first point proposed, and the opinion of the Court below on it, delivered the opinion of this Court, as follows:—

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This was an abstract question which the Court are never bound to answer, without applying the general principle of law to the case before the jury, and making such observations and distinctions as are necessary. Thus, after saying that this question, might in the abstract, be answered in the negative, the Court went on to explain to the jury, that under certain circumstances, the same question might be answered in the affirmative. A warrant dated in *June*, 1763, and totally abandoned until *September*, 1812, might give no right, and yet it might give a perfect right, if it had been followed up in a reasonable time, by a survey which had been destroyed without the fault of the warrantee, or it might give a right even without a survey, if it described the land with reasonable certainty, and the warrantee took possession under it, designated the boundaries of the land in such a manner as to be well known to his neighbours, and retained a continued possession until the time of his survey in 1812, and more especially it would entitle the plaintiffs to recover against the defendants, if they came to the occupation of the land in dispute, as tenants of the plaintiffs. Now this is just what the Court said, and, in my opinion, with great propriety. In the case of *Blaine v. Johnson*, 3 Binn. 103, it was laid down for law, that a notorious and well established possession, under a location descriptive of the land, was an appropriation sufficient to support an ejectment. Whether there had been such a possession in the present instance, was a question for the jury, but the charge of the Court was, in point of law, correct.

2. [Here the Chief Justice read the second question, and the answer of the Court.]

If the proprietor of a surveyed tract, passes over his line, and cuts wood upon the vacant land of the Commonwealth, so far from acquiring a right to the vacant land, he is to be considered as a trespasser. The second question was, therefore, answered rightly. But after answering it, the Court proceeded to say, that “perhaps, an inclosed piece of land might be *defended* against an intruder without right.” This is surplusage. An opinion was not asked on such a case.

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The law, however, was not mistaken. Where both are trespassers, *potior est conditio defendentis*.

3. [Here he read the third question, and the answer of the Court.]

The draft of *James Moore's* larger tract, called for his *other land*, (the land in dispute,) on one of its lines, where *Ephraim Blaine* has a survey; therefore, the defendants inferred, that the land in dispute was taken away by *Blaine's* survey, and the plaintiffs had no right to shift it; and they insisted, that the plaintiffs were estopped from denying what was asserted on the face of *James Moore's* draft. In this they went too far. The draft is evidence, but not conclusive. It is the act of the surveyor, who may possibly have been mistaken as to the owner of the adjoining tract. Besides, there was a particular reason why the plaintiffs should not be concluded from locating the land in dispute as they have done; part of it does, in fact, adjoin *James Moore's* larger tract, on the line which calls for it, although *Blaine's* survey, also, adjoins another part of the same line. After all, the situation of the land in dispute, and whether it agreed with the description in the warrant, were facts to be decided by the jury, and the Court submitted it to them.

4. [Here he read the fourth question, and the answer of the Court.]

This point is too plain to admit of argument. A tenant who contrives to deprive his landlord of all the benefit of possession, under a fraudulent pretence of giving it up, cannot be said to have complied with his duty.

5. [Here his honour read the fifth question, and the answer of the Court.]

In this question, the defendants assume the fact of *William Graham, jun. not being a tenant*. The Judge says, that no such man as *William Graham, jun.* was mentioned by a single witness in the cause, nor was there any evidence of title in him. But, if he came in, under *Eccles*, who came in under *William Graham, jun.*, who was the tenant of the plaintiffs, he is in no better situation than the tenant, and cannot defend his possession against the landlord. And at all events, after the long possession of the plaintiffs under *James Moore's* 50 acre warrant, (if the jury should think the warrant descriptive, and should believe the plaintiffs witnesses who swore to the

possession,) the plaintiffs would be entitled to recover. This question is not answered so distinctly as it might have been. Yet as it is in substance said, that *William Graham, jun.* could not withstand the plaintiffs' action, and considering the situation in which he stood, it appears, that the plaintiffs were entitled to recover against him, the jury could not have been misled to the injury of the defendants; and, therefore, there is no cause for reversing the judgment, for any defect in this part of the opinion.

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Upon the whole of this case, I am of opinion, that the judgment should be affirmed.

Judgment affirmed.

### SMITH against FULTZ.

IN ERROR.

Monday,  
October 12.

ERROR to *Cumberland county.*

The plaintiff below, *Jane Smith*, claimed the land for which this ejectment was brought, under a warrant, dated 13th September, 1774, in the name of *John Agnew*, for 100 acres, adjoining some improvements made by *William Hayes*, on the south side of *Sideling Hill*, on *Campbell's Run*, *Rye township*, *Cumberland county*. On this warrant, a survey was made by *Matthew Henderson*, deputy surveyor, on the 13th November, 1775, on a tract of land about one mile distant from the land in dispute, which answered the call of the warrant, with reasonable certainty. The survey was never returned, but it appeared, that about the year 1770, improvements had been made on the tract for *Sarah Wilson*, in trust for whom, the warrant was taken out by *Agnew*, and from whom, as heir at law, the plaintiff derived title; that from

A, took out a warrant in trust for B, on which a survey was made in the following year, on land which had been previously improved, and which answered the calls of the warrant. The survey was never returned, but B, and those who claimed under her, constantly resided on the land. Fourteen years afterwards, a second survey was made by virtue of the

same warrant, on other land, which also answered the calls of the warrant. This survey was not returned, nor were the surveying fees paid, nor was any improvement made on, or possession taken of the premises.

Held, that the second survey was void, and would not prevail against a fair settler, although he had actual notice of it, before he began his settlement.

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that time, until her death, which happened about ten or twelve years before the trial, she and her tenants, constantly resided on it, and that the plaintiff from that period, until the cause was tried, continued to reside upon it. On the 19th May, 1789, another survey was made on the same warrant, by *Samuel Lyon*, the deputy surveyor, on the land in dispute, which also corresponded with reasonable certainty with the description in the warrant. This survey also, was never returned, nor were the surveying fees ever paid; but in the fall of the year 1809, when *William Murphy*, under whom the defendant claimed, was making an improvement on the land, he was forbidden, by *Moses Hayes*, who shewed him the survey of 1789, informed him that the warrant had been conveyed to him by *John Agnew*, and referred him to the records in *Carlisle*, for the truth of the fact. On searching the records however, no such conveyance could be found.

On the part of the defendant, the evidence was, that in the year 1809, an improvement was made on the land in dispute, by *William Murphy*, who by deed, dated, *February 2d*, 1810, conveyed it to *Frederick M. Cooskey*, by whom a warrant was taken out on the 6th *February*, 1812, interest from the 1st *March*, 1810. On this warrant, a survey was made on the 6th *March* following, of 175 acres, by *William Wheeler*, who in the same year, returned it as land in dispute with *Jane Smith*. *Jane Smith* never entered a caveat.

The Court below charged the jury, that if the warrant, under which the plaintiff claimed, was really descriptive of the land surveyed in 1775, and if it appeared to the jury from all the facts before them, that it was intended for that tract, their opinion was, that it was not in the power of the plaintiff to remove the warrant, and by a new survey in 1789, under the same warrant, appropriate other land more than a mile distant; that after such a lapse of time, notwithstanding the land in dispute answered the description in the warrant with rather more accuracy than the land first surveyed, a fair settler was entitled to consider it as vacant, particularly as it did not appear that the survey of 1789, was made by the deputy surveyor with any notice of the prior one of 1775, or by any order of the board of property; as no improvement was ever made, or any act ever done, in prosecution of

the last survey, and as no surveying fees had been paid; and 1818.  
that the notice given by *Hayes*, to *Murphy*, in the autumn of *Chambers-*  
1809, conferred no right on the plaintiff. *burg.*

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The jury found a verdict, in conformity with this charge,  
and the cause was removed by the plaintiff to this Court.

*Carethers* and *Mahon*, for the plaintiff in error, contended, that the Court below erred in their instruction to the jury, that under the circumstances of this case, the plaintiff was bound by the warrant of 1774, as surveyed in 1775, and that he could not by a subsequent survey, before the first was returned, appropriate other land without a new warrant. It is not contended that a second survey can be made after one has already been executed on the same warrant; the argument is, that the first survey was, by a mistake of the deputy surveyor, laid upon the wrong tract; a tract which *John Agnew* held by improvement, and which he afterwards devised to *Sarah Wilson*, who had no title to it, except under his will: In 1789, the mistake was discovered, and rectified by *Agnew*, who procured a survey to be made on the land in dispute, by virtue of the warrant of 1774, which he held in trust for *Sarah Wilson*, his first survey never having been returned. No third person had in the mean time, acquired an interest in the land; there could therefore, be no objection to having the error amended by a new survey on the land, for which the warrant was designed. Before a survey is returned, the lines may be extended, and it may be otherwise corrected by the deputy surveyor, provided he does not interfere with prior rights. *Lessee of Biddle v. Dougall.*(a) *Lessee of Miles v. Potter.*(b) And where the land surveyed on a location, has been taken away by an older location, a new survey may be made on other land, answering the call of the location rather better, provided the first survey has not been returned. *Lessee of Waddle v. Gray.*(c)

The circumstance of the survey not having been returned, cannot affect the plaintiff's title, so far at least, as relates to the defendant. The facts given in evidence, are equivalent to a return of survey; they prove an actual and legal notice of the appropriation of the land, by the survey of 1789, in

(a) 2 Binn. 37.

(b) 2 Binn. 66.

(c) *Addison's Rep.* 248.

1818: *Chambers v. burg.* p<sup>er</sup>suance of the warrant of 13th September, 1774; and even on a shifted survey, the rule is, that the title attaches from the return, or from notice, before return.

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*Metzger and Watts*, for the defendant in error, answered, that this was a bold attempt, to hold two tracts under one warrant. When a survey is made, the warrant is *functus officio*, and the presumption of law is, until the contrary appears, that every survey is made with the consent and knowledge of the warrantee. When he dissents, it is incumbent on him, to use diligence in signifying his dissent, and making his complaint. *Leasee of Drinker v. Holliday* (a) *Leasee of Porter v. Fergusson*. (b) *Agnew* knew where his warrant was laid, and far from shewing any dissatisfaction, acquiesced in the first survey, from 1775, till 1789, and even then, no step was taken to carry the second survey into effect; it was not returned, nor were even the surveying fees paid. *Agnew* and *Wilson*, always held the land surveyed in 1775; it was devised to her by his will, and neither claimed any other tract, until 1789. From the whole case the conclusion is, that this was the tract for which the warrant was intended; that it was fairly and intentionally appropriated by the first survey, and that the effort now is, in an unauthorized manner, to extend the same warrant to two different tracts of land. In the case cited from *Addison's Reports*, the mistake of the first survey was soon corrected, and the land upon which it was made, was taken away by an elder survey. It therefore bears little analogy to this. With respect to notice, it was of no importance, because the person giving it, had no title.

The opinion of the Court was delivered by

DUNCAN J. The plaintiff claims under a warrant to *John Agnew*, of 13th September, 1774, and a survey by the deputy surveyor, on 19th May, 1789. The warrant is for 100 acres, adjoining some improvements made by *William Hayes*, on the south side of *Sideling Hill*, on *Campbell's Run*, *Rye* township, *Cumberland* county. The survey was not returned; the warrant was taken out by *John Agnew*, in trust for *Sarah Wilson*, whose heir the plaintiff is.

The defendant claims under a settlement made in *March*,

(a) 2 Yeates, 23.

(b) 3 Yeates, 60.

1810, on which a warrant was taken out by *Frederick M. Cooney*, 1818.  
 on the 6th *February*, 1812, and a survey of the 6th *March*, 1812, *Chambers-*  
 returned in dispute with *Jane Smith*. The settler, before he *burg.*  
 had made his settlement, had actual notice of this survey. *Smith*  
 Did it rest here, as the warrant of *John Agnew* describes the *v.*  
 land with reasonable certainty, and as it was actually surveyed, *Furze.*  
 and notice of such survey given, before inception of the de-  
 fendants title, the plaintiff would be entitled to recover; but  
 the case from the evidence given by both parties, assumed a  
 totally different aspect; for it appeared, that about 1770,  
 some improvements had been made for *Sarah Wilson*, on  
 another tract adjoining *William Hayee*; which tract is des-  
 cribed with reasonable certainty, by the warrant of *John Ag-*  
*new*; though it might with more precision describe the  
 land in dispute, yet it was sufficiently descriptive of the land;  
 that constantly from the time of this improvement, *Sarah Wil-*  
*son*, and those claiming under her, have occupied that tract,  
 and do now occupy it; that on the warrant of *John Agnew*,  
 a survey of this tract was made by *Mathew Henderson*, the  
 assistant of *John Armstrong*, the deputy surveyor of *Cumber-*  
*land* county, on the 13th *November*, 1775; an official survey,  
 remaining in the office of the surveyor of the district.

In the conveyance from *John Agnew* to *Sarah Wilson*,  
 which transfers this warrant, and another warrant of the 11th  
*August*, 1805, for 105 acres, adjoining *William Hayee*, in the *hab-*  
*endum*, it is, to have and to hold the above described tracts of  
 land with the improvements thereon. It is to be observed, that  
 this conveyance, is without witnesses, and without date, and  
 is in the hand writing of *John Agnew*; it would appear, that  
 this deed was not perfected, but was intended, when it should  
 be delivered, to be attested by subscribing witnesses, and the  
 date inserted.

The will of *John Agnew*, of the 3d *April*, 1790, in which he  
 devises these lands to *Sarah Wilson*, describes it as a tract of  
 land then in possession of *Thomas Fleming*. The evidence  
 was, that *Thomas Fleming*, at that time, lived on the tract  
 surveyed by *Mathew Henderson*, as the tenant of *Sarah Wil-*  
*son*. The first presumption certainly is, that the warrant  
 was taken out for the lands improved for *Sarah Wilson*; but  
 this amounts to demonstration, when the warrant does de-  
 scribe the improved land, and when, in little more than one  
 year, it is actually surveyed on the lands improved, and when

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possession, is continued and no complaint that the survey was improperly made for 14 years, and no call for another survey during all that time; the *prima facie* evidence, that the survey was made by consent of the owner, becomes positive evidence of the fact. It never can be, that the party can renew his warrant at pleasure, and say at the end of 14 years, I will hold this tract by improvement, and I will remove my survey to another tract; for if it be so, this warrant may again be removed, as there is no return of either survey; and if Sarah Wilson had made a settlement on the tract in dispute, she might claim it under such settlement, and renew her warrant again. This floating, moveable right, would, on the principles contended for, never be fixed or permanent, but might again and again be put in motion, as the interest of its owner might direct its movements. Such fluctuating, capricious, itinerant rights, are unknown to the law.

The Court did not then err in their charge to the jury, in the manner in which they laid down the law, as applicable to this case. The survey made by Samuel Lyon, on the warrant in 1789, was made without any authority; the warrant was *functus officio*, and the survey void. Cases may exist, where a surveyor, without order of the board of property, or direction of the surveyor general, may make an addition, or even a new survey; decisions are to be found to this effect; but they all depend on special circumstances, and this ingredient will be found in all of them, that the first survey was made by mistake of the surveyor or owner, or by fraud of the surveyor; that complaint was made as soon as the discovery was made; by mistake, as including the lands held by another, or prior right, or not including the full quantity; by fraud, as made against, or without the consent of the owner; the complaint early made, and the mistake rectified in some reasonable and convenient time. But these decisions have no application to a case circumstanced as this was; the land remained open to settlers, and purchasers from the Commonwealth; the vacant, unappropriated lands of the State, after the survey of 1775. There was no legal title under the warrant of John Agnew, nor spark of equity, the notice of which could affect the defendant; the notice of the survey of 1789, void as it was considered by the Court to be, was immaterial; notice of a void act cannot give it validity; notice is only material of some valid act. A man by giving no-

tice of an act void in itself, and which act confers no title, either in law or equity, cannot prevent others from purchasing that, which is not appropriated to another. One having this notice, the conscience is not affected by such notice, nor is it against conscience for any other to acquire a title. In *Wilson v. Mason*, (Supreme Court of the *United States*,) 1 *Cranch*, 100, the effect of such notice was under consideration; the Court decided, that a *caveat* may be considered as in the nature of an equitable action, and be evidence, that *Wilson* had express notice of *Mason's* survey, and the counsel for *Mason* insisted, that *Wilson* having notice, he was unable to acquire title to the land appropriated by the survey of *Mason*; this, observes the Court, would be true if the survey gave to *Mason*, title, either in law or equity; but if a survey without an entry was no appropriation, it gave no title; there the notice of the survey could not create a title. The doctrine of notice is well established; he who acquires a legal title, having notice of the prior equity of another, becomes a trustee for that other, to the extent of his equity; but if he has no equity, then there is nothing for which the purchaser of a legal estate can be the trustee. With respect to the opinion of the Court, as to the mode and the person by whom the notice was given, this could not affect the merits of the case. The survey not being barely irregular, where notice most affected, but void *ab initio*, in which case notice cannot in any way be material, or affect the conscience of any man.

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burg.SMITH  
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Judgment affirmed.

1818.

Chambers-  
burg.**DUNCAN against M'CULLOUGH administrator of  
FINDLEY.**Monday,  
October 12.

IN ERROR.

If the maker of a promissory note is not to be found when the note becomes due, a demand on him of payment is not necessary, in order to charge the indorser. But it is necessary to prove, either a demand, or due diligence, in endeavouring to make a demand.

It is not incumbent on the endorser of a promissory note, to shew the holder, where the maker is to be found.

The time and manner of examining witnesses, is in the discretion of the Court, before whom the trial takes place.

Under what circumstances the Court will refuse to permit the plaintiff to introduce new evidence, after the defendant's counsel has begun to address the jury.

Query, Whether this Court will reverse for error, in a point in which the law permits the inferior Court to exercise their discretion?

IT appeared on the return of a writ of error to *Franklin* county, that this suit was brought by *Matthew Duncan*, the plaintiff in error, against the defendant, as administrator of *William Findley*, deceased, on a promissory note for 200 dollars drawn by *Stirling Adams*, payable to *William Findley* or order, nine months after date, and indorsed by *Findley*. It was dated at *Baltimore*, June 4th, 1814. It was not proved, at what place *Adams* drew the note, but some time in the summer of 1814, he boarded at *Green Village*, in *Franklin* county, in this State, at the house of one *James M'Anulty*. Before harvest of the same year, he went from *Green Village* to *Baltimore*, to which place the plaintiff followed him, and got from him several horses, and other property. *Adams* was seen some time after this, at *Baltimore*, by one of the plaintiff's witnesses, but where he was when the note fell due, did not appear, nor was there evidence that search had been made for him by the plaintiff. No notice was given to *Findley*, of the non-payment of the note, before this suit was brought, ten months after the day of payment.

The counsel for the plaintiff, prayed the Court below, to deliver their opinion to the jury on two points.

1. Whether it was incumbent on the plaintiff, under the circumstances of this case, to prove a demand of payment from the drawer of the note.

2. Whether *William Findley* was not bound to shew where the drawer was to be found.

To the first question the Court answered, that the plaintiff was bound to prove a demand, or due diligence used for that purpose. To the second question they answered, that it was not incumbent on *Findley*, to shew where the drawer

was to be found. An exception was also taken to the decision of the Court below, in rejecting testimony offered by the plaintiff. The exception, and the facts out of which it arose, will appear in the opinion of the Court, and therefore need not be stated here.

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*burg.*

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M<sup>c</sup>COLLOUGH  
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*Brown and Crawford*, for the plaintiff in error, relied on *Stewart v. Richardson*.(a) *Bull. N. P.* 273. *Chitty on Bills*, 155. *Putnam v. Sullivan*.(b) *Hull v. Pitfield*.(c) *Am. Dig.* 88. *Alexander v. Byron*.(d) *Boot v. Franklin*.(e)

*Chambers and Riddle*, for the defendant in error, referred to *Curren v. Connery*.(f) *Edwards v. Thayer*.(g) *Bond v. Farnham*.(h) *Collins v. Butler*.(i) *Bank of North America v. M<sup>c</sup>Knight*.(j) *Jackson v. Richards*.(k) *Berry v. Robinson*.(l) *Stewart v. Eden*.(m) *May v. Coffin*.(n)

The opinion of the Court was delivered by

TILGHMAN C. J. If the plaintiff had proved, that *Adams* had absconded, and was not to be found when the note fell due, a demand of payment would have been dispensed with, because it would have been impossible to make it. But no such thing was proved, and therefore, a demand was necessary. The notes being dated at *Baltimore*, would raise a presumption, that *Baltimore* was the drawer's place of residence, as was decided by the Supreme Court of *New York*, 2 *Caines' Rep.* 127. *Baltimore* then, was the place at which enquiry should have been made. The Court laid down the law fairly. A demand, or at least due diligence in endeavouring to make a demand, was necessary.

2. Why was it incumbent on *Findley*, to shew where the drawer was to be found? It does not appear that the plaintiff ever applied to him for that purpose, or even informed him of the non-payment of the note. Under these circumstances, *Findley* was in no default, but the plaintiff was in default, in

(a) 4 *Binn.* 199.

(b) 4 *Mass. Rep.* 45.

(c) 1 *Wils.* 46.

(d) 2 *Johns. Ca.* 318.

(e) 3 *Johns.* 207.

(f) 5 *Binn.* 488.

(g) 2 *Bay.* 217.

(h) 5 *Mass. Rep.* 170.

(i) 2 *Str.* 1087.

(j) 2 *Dall.* 158.

(k) 2 *Caines*, 344.

(l) 9 *Johns.* 121.

(m) 2 *Caines*, 127.

(n) 4 *Mass. Rep.* 341.



1818. not giving notice of non-payment, and therefore he was not entitled to recover in this action.

*Chambers-  
burg.*

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M'CULLOUGH  
administrator  
of FIDELITY.

But there is another error assigned. After the plaintiff had concluded his evidence, the defendant's counsel, who rested the cause on the plaintiff's evidence, began their address to the jury. During this address, the plaintiff's counsel, asked leave of the Court, to offer further evidence. When this motion was made, the defendant's witnesses were called, and did not answer, but during the argument on the motion, they all appeared except one. The Court rejected the evidence. When the jury came to the bar, to give their verdict, the plaintiff proved, that the witnesses of the defendant, who had not answered, had been seen in the courthouse, between three and four o'clock that afternoon.

The time and manner of examining witnesses, is a matter very much in the direction of the Court. It is not regular to introduce evidence, after the counsel have begun their address to the jury, although, where circumstances render it proper, the Court may permit it. No particular reason for breaking through the general rule, appears in this instance; no new witness arrived, who had been subpoenaed, and failed to appear before the evidence was closed. The plaintiff's witnesses, for all that appears, were all on the spot when his counsel declared, that they had closed their evidence. To make a general practice of introducing new evidence, when from the argument of the adversary, it is found where the shoe pinches, might lead to perjury, and at all events, it would be productive of confusion in trials. But there was a particular reason against it in this case. The defendant had discharged his witnesses, and one of them was not to be found. Had the evidence been admitted, he might have complained of being taken by surprise. As for the proof, when the jury were about to give their verdict, that the absent witness had been seen in the course of the afternoon, it was of no consequence, because it was not proved, that the defendant knew of his being in Court. I cannot say therefore, that the Court acted with too great rigour, when they rejected the evidence. Whether this Court will reverse for error, on a point in which the law permits the Court below to exercise their discretion, is a question, which it is unnecessary to decide, as it does not appear that there has been any abuse of discretion. I have gone through the exceptions

relied on by the counsel for the plaintiff; in my opinion, they have not been supported, and therefore, the judgment should be affirmed. 1818. *Chambersburg.*

Judgment affirmed.

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v.  
M'CULLOUGH  
administrator  
of FINDLEY.

**DUNCAN against M'CULLOUGH administrator of  
FINDLEY.\***

IN ERROR.

*Monday,*  
*October 12.*

THIS was a writ of error to the Court of Common Pleas of *Franklin* county.

In the Court below, it was an action on a joint and several promissory note, drawn by *William Findley* and *Sterling Adams*, in favour of *Matthew Duncan*, the plaintiff below, for 600 dollars, payable nine months after date. No bill of exceptions, or statement of facts, having accompanied the record on the return of the writ of error to this Court, the circumstances of the case must be collected, as far as is practicable, from the opinion of the Court, which was filed of record, agreeably to the act of assembly of 24th *February*, 1806.

The declarations of a party that a contract was fair are evidence, but not conclusive, that the transaction was not fraudulent. Where a contract is in itself fraudulent, it is void, and cannot be confirmed by any subsequent declarations or acts by which its fairness is acknowledged.

The following points were stated, on which the Court were requested by the counsel for the plaintiff, to instruct the jury.

1. That drunkenness is no ground to set aside a contract, unless it deprives a party of his reason and understanding.
2. That where time is given for reflection and sobriety, if the party does not object to the contract, a court of equity will not set it aside.
3. That where several months have elapsed, and the party does not complain, but on the contrary expresses his satisfaction with the contract, equity will not relieve against it.
4. That if the jury were of opinion, that the property sold, would cover the amount of this note, or any part, taking into

\* *Vide ante*, 480.

1848. consideration the property already paid and delivered, the plaintiff was entitled to recover that amount, leaving the notes yet to be tried, out of the question.

*Chambers-  
burg*

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v.  
McCULLOUGH  
administrator  
of FINDLEY.

#### Charge of the Court of Common Pleas.

"The great question for the consideration of the jury is, whether strong circumstances of fraud have not been disclosed, and proof of a combination, in which the plaintiff was a party, to defraud the defendant's intestate, *William Findley*. The plaintiff has been called upon, and notice has not been denied, that the inquiry as to the claim of the plaintiff would rest on shewing the equity of his demand, and the consideration on which the note, the subject of the demand, was founded. The jury have had a great variety of testimony; and the statements now produced to the jury, on each side, present the result, as it respects their different pretensions. The plaintiff insisting, that he has established his demand to the whole of the note now in suit, and the defendant, on the contrary, contending, that no money is due on the note now in controversy, nor due on those in suit now depending; but the jury are instructed to confine themselves to the suit before the Court and them; and from an investigation, conducted with impartiality, and the most careful consideration, to say, how much, if any thing, is due to the plaintiff, or to find a verdict for the defendant, if they are of opinion, that the plaintiff ought not to recover in this suit.

"In answer to the question proposed by the plaintiff's counsel, the jury are instructed, that the drunkenness of one of the parties is not sufficient to set aside an agreement, unless some unfair advantage is taken; but, that if a gross combination of fraud and deception, has been practised on the defendant, and it clearly appears to the jury, that the plaintiff has been a party to it, such fraud proved, will avoid any transaction to which it applies. In the present instance, the jury will consider the weight of evidence, and its operation in establishing the claim of the plaintiff, and the items on which his demand arises: the property delivered at *Baltimore*, and its operation are already submitted to the jury, that so far as any of the claims set up by the plaintiff, are honest and just, to account for and explain the consideration of the note, they ought to be received and admitted; if fraudulent and dishonest to be rejected. And the jury are also to consider the

circumstances of the partnership purchase, and what Mr. 1818.  
*Duncan* received on that account, if any thing, at *Baltimore, Chambers-*  
 in part of the amount of the purchase of horses from him, as *burg.*  
 well as the grain delivered, and money paid by the defend-  
 ant's intestate.

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 administrator  
 of *FINDLEY.*

"If, from the investigation, the result should be adverse to, and destroy the plaintiff's demand, the Court is of opinion, that the intestate's declaration, two or three months afterwards, that the plaintiff had used him well, and had been a father to him, and that he had not been cheated, would not of itself repel the defence, (if otherwise satisfactory,) which is now set up by the defendant.

"In the case of a contract, mere drunkenness, especially if time elapses, after the party becomes sober, and he acquiesces during that time, will not of itself, if there is no express evidence of an unfair advantage taken of him, avoid it. The observation and principle already stated, sufficiently answer all that the plaintiff's counsel have requested to be answered by the Court, as matter of instruction to the jury."

The jury found a verdict for the defendant.

*Brown and Crawford*, for the plaintiff in error.

*Riddle and Chambers*, for the defendant in error.

The opinion of the Court was delivered by

GIBSON J. The charge of the Court has been filed under the act of assembly, but the evidence has not been brought up by a bill of exceptions; so that very few of the facts appear on the record. It seems, however, the defendant gave evidence of a continued state of intoxication of the intestate, about the period when the note, on which the suit is brought, was signed; and also of a conspiracy between the plaintiff and a certain *Sterling Adams* to defraud him, and by taking advantage of his state of inebriety to procure him to sign this, among other notes. To rebut this, the plaintiff gave evidence of declarations of the intestate, made three months after the date of the note, that the plaintiff had used him well, had been a father to him, and had not cheated him; and then prayed the Court to direct the jury, that when after a lapse of several months, time is given for sobriety and reflection to return,

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*Chambers-  
 burg.*  


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 of FINELEY.*

and the party does not object, but on the contrary expresses satisfaction with the contract, equity will not relieve. The Court was of opinion, that if there was fraud in fact, these declarations would not of themselves defeat the defence set up. Now the question here was fraud or not. The declarations of the intestate were evidence, though not conclusive, that no fraud originally existed; they might be explained and shewn to have been made under a misapprehension of the true state of the fact, or undue influence of the plaintiff, acquired from extrinsic causes continuing to operate at the time. Hence it rested with the jury to decide, on a view of the whole ground, whether the note in question had originally been obtained through fraud or not. But it is argued, that if it even were so obtained, still, those declarations made at a time when the intestate must be supposed to have recovered from inebriety, operated as a confirmation of the contract, and purged it of the original fraud. But were not the jury to judge, whether the original delusion, or any other, operated at the time of the declarations? But take it, the intestate made the declarations with full knowledge of all necessary circumstances, while free from every improper influence, and it is clear they will not amount to a confirmation, for the case does not admit of it. The case of *Chesterfield v. Janssen*, 2 Ves. 125. 1 Atk. 301, is cited by the plaintiff's counsel, but I confess I cannot see with what hope of benefiting their cause. In that case, there was no imputation of fraud or moral depravity in the original transaction. Mr. *Spencer* obtained a loan from the defendant, on condition of paying double or nothing, on the event of his surviving the Duchess of *Marlborough*. The transaction was, without success, attempted to be impeached on the ground of usury; and as to its being an unconscionable bargain, obtained from a man forced by his necessities to anticipate an estate in expectancy, it was held this was obviated by giving, with full knowledge of all necessary circumstances, a new security in confirmation of the original transaction, when all embarrassment had ceased. The cause was most ably argued, and decided on great consideration; by Lord *HARDWICKE*, assisted by able Judges; it is, therefore, of great authority. Now, there was nothing like what Lord *HARDWICKE* called *actual* fraud, arising from facts and circumstances of positive deceit, but only a sort of fraud arising from the circumstances, and the condition of the

contracting parties; and a contract merely unconscionable, by reason only of the latter consideration, always admits of confirmation. Public policy is the ground on which chancery protects men in necessitous circumstances, from becoming the prey of those disposed to take advantage of the pressure of their wants; they are protected against themselves. But after a man's embarrassments are removed, and he has ceased to be a fit subject for the protecting care of chancery, it is perfectly reasonable to permit him to validate that which was originally invalid from policy merely, and not on account of moral turpitude, in the adverse party. Where, however, there has been actual and positive fraud, or the adverse party has acted *mala fide*, there can be no such thing as a confirmation; what was once a fraud, will be always so. The reason of the distinction is, that a contract, infected with that kind of fraud which must be proved, and not presumed from the circumstances of the parties, is not merely voidable, but void; and confirmation, without a new consideration, would be *nudum pactum*. If the transaction in *Chesterfield v. Farnsen*, had been usurious, all the Judges agree, that no subsequent confirmation would have been available. *Ardglasse v. Muschamp*, 1 Vern. 237. *Wiseman v. Beake*, 2 Vern. 121, and *Baugh v. Price*, 1 Wils. 320, are express, that a contract positively fraudulent, cannot be confirmed by subsequent acts; and in *Brooke, executor of Hobart v. Gally*, 2 Atk. 34, Lord HARDWICKE decreed a note to be delivered up, that had been given voluntarily by a person of full age, to a victualler for burgundy, champagne, and claret, clandestinely furnished him when an infant at school.

There is another point which, as the evidence has not come up with the record, it is difficult to comprehend or decide. It would seem, however, evidence was given of mutual dealings, and the Court were requested to charge, that if the property sold to *Findley* would cover this note, or any part of it, the balance might be recovered in this suit. It appears to us, the Court did so instruct the jury. *Findley* had given the plaintiff other promissory notes, on which alone the defendant contended the balance of the general account, if any were due, could be recovered. The Court referred the jury to the statement exhibited on each side, and directed them to confine their attention to the note in suit, and if any thing were due, to find a verdict for so much. On this ground

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McCULLOUGH  
administrator  
of FINDLEY.

1818. then, the plaintiff had no right to except; but if the direction  
*Chambers-* had been different, it might be right from every thing that  
*burg.* appears; for if at the time of executing this note, *Findley*  
*DUNCAN* were not indebted to the plaintiff, it would be void for want  
*v.* of consideration, and would not be recoverable, even though  
*McCULLOUGH* he afterwards became indebted. Having the evidence very  
*administrator* imperfectly before us, it would be difficult to say, that any  
*of FINDLEY.* direction the Court might choose to give, was wrong. The  
judgment must be affirmed.

Judgment affirmed.

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GLEN and others *against* GLEN.

*Monday,*  
*October 12.*

IN ERROR.

A, being  
seised of a  
tract of land  
containing 400  
acres, convey-  
ed to B, a part  
of it, described  
by boundaries,  
which, how-  
ever, were  
vague, and did  
not completely  
surround it;  
and stated to  
contain 200  
acres, more or  
less. It was  
afterwards  
surveyed by a  
person, ap-  
pointed by  
both parties,  
who informed  
them, that the  
survey con-  
tained 200  
acres, with  
allowance of  
six per cent.  
for roads, &c.  
The land thus  
surveyed, was  
delivered by  
the grantor, to the grantee, by whom it was held, during his life, and by his widow, after his death.  
After the death of both the grantor, and grantee, and 13 years after the execution of the deed, it  
was discovered, that the tract contained, 213 acres, 141 perches, instead of 200 acres.  
*Held,* that the heirs of the grantor, were not entitled to recover the overplus of 13 acres, 141  
perches.

*April, 1795, Ralph Martin*, who was employed by both the father, and son, surveyed a parcel of land, part of the tract of 400 acres, and informed them, that it contained 200 acres, with an allowance of six per cent. for roads, &c. The land thus surveyed, was delivered by *Thomas Glen*, to *Alexander*, by whom, and by his widow, the defendant, the possession had been since, uninterruptedly held. Shortly before the commencement of this ejectment, some marked saplings were found standing on one of the lines, and a fence exactly on the same line. *Thomas Glen*, lived about three years after the execution of his deed, knew that his son *Alexander* held according to the lines of *Martin's* survey, and never made the smallest objection. But after the death of both *Thomas* and *Alexander Glen*, it having been discovered, that *Martin's* survey contained more than 200 acres, the plaintiffs brought this suit, thirteen years after the execution of the deed, for what they alleged to be included in the said survey, over and above the 200 acres, with the allowance of six per cent.

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*burg.*

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and others  
v.  
GLEN.

The plaintiffs gave evidence, that there was a surplus of upwards of thirteen acres, and prayed the Court, to direct the jury, that by the deed of *Thomas Glen*, his son *Alexander*, was entitled to no more than 200 acres strict measure, with an allowance of six per cent. ; and if it should appear to the jury, that *Martin's* survey, included, by his mistake 213 acres, 141 perches, with the allowance, &c., he having stated it to contain but 200 acres, the mistake might be rectified by a verdict for the plaintiffs, for the surplus of 13 acres, 141 perches. The opinion of the Court was against the plaintiffs, and exception to it was taken by their counsel.

*Mahon* and *Carothers*, for the plaintiffs in error. Had this been a sale, by courses and distances, or had the land been described by certain and fixed boundaries, the grantee would perhaps have been entitled to hold it, according to the description, without regard to the number of acres mentioned in the deed. In such cases, the risque of quantity, enters into the contemplation of the parties. But in the present case, the description was extremely loose. The grantor owned about 400 acres, a certain part of which, he intended to convey. The deed called for boundaries, only on three sides, and evidently looked to a subsequent survey, to re-



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duce to certainty, what was so imperfectly described. Quantity, therefore, was the essence of the contract. In ascertaining this, the surveyor made a mistake in the calculation, and we contend, it is such a mistake, as it is the province of a court of chancery to relieve against; and if so, it is within the equitable powers of this Court. That there was a mistake, was admitted by the Court below, who however erroneously declared, that under the circumstances of the case, it could not be rectified, after the lapse of thirteen years. This was not such a lapse of time, as will afford a presumption, that the mistake was discovered, and acquiesced in. There was no evidence of the discovery of the mistake, until a short time before the commencement of this suit. If there had been fraud, it will not be pretended, that the defendant could retain the land; and where is the difference, in effect, between detaining what was given in mistake, and acquiring it by fraud? The words, "more or less," were probably introduced by the scrivener as a matter of course, and were not intended by the parties to have any effect. If any was intended, they were designed to cover any difference, which might arise from the uncertainty of instruments; and with this view, they are usually inserted in deeds. But where the intention is to convey only a certain number of acres, which was manifestly the case in this instance, 13 acres, and 144 perches, are too much to allow for inaccuracy of instruments, and chain carrying. On the amount of the excess, the Court made no observations to the jury, but the Judge, assuming the functions of a chancellor, undertook to decide both the law, and the fact. This was certainly error. The authorities which bear upon this subject, by no means sanction the idea, that where the description is so undefined, as it is in the deed in question, a greater quantity of land will pass, than is expressly stipulated for. Some of our Courts have gone beyond the English law on this subject. It is said in *Sugden*, 201, that where in a conveyance, lands are mentioned to contain so many acres by *estimation*, or the words "*more or less*" are added, if there be a small excess, the vendor cannot recover it back; or if there be a small deficiency, the vendee is entitled to no compensation in respect to it. The inference is, that the rule does not extend to cases of great excess, or deficiency. In the same book, (p. 202.) it is laid down, that equity will relieve the vendor,

where more land has passed than was contracted for. See also 1818. *Powel on Contracts*, 77, 78, 79. 195. In *Virginia* too, if on a sale of land, the deficiency be greater than might reasonably arise from a difference of instruments, or a common mistake of the surveyor, the Court will grant relief. *Hull v. Cunningham*, (a) *Nelson v. Matthews*, (b) In *Pennsylvania*, and *New York*, there have been decisions, which are opposed to the law as now stated, but they have never yet been extended to the point, to which it is attempted to carry the present case; nor have those decisions been stamped with the unanimous approbation of the Court. In *Smith v. Evans*, (c) the land was described by courses and distances, yet Judge YEATES, in opposition to a majority of the Court, was of opinion, that the defendant was entitled to a deduction from his bonds, on account of a deficiency. *Boar v. M'Cormick*, (d) was likewise the case of a sale by ascertained boundaries, and though it was decided, that under the circumstances of the case, the defendant could not claim a deduction, yet the Chief Justice declared, that there might be extreme cases, in which a court of chancery would infer, *ex natura rei*, that there had been great misapprehension, and on that ground, relax the strict rules of law. And he admits, that in a case of great deficiency, relief would be granted, on the principle, that the consideration of the contract had failed. The case of *Mann v. Pearson*, (e) which was decided by three Judges against two, may be referred to the same class. On the whole, as the deed furnishes no accurate description of the land, as it was obviously intended to convey only a certain number of acres, to be subsequently ascertained by survey, and as a mistake has been made in a considerable quantity, by the inaccuracy of the surveyor, that mistake may certainly be rectified; and for this purpose, the proper remedy is an ejectment, in which the plaintiff may demand as much as he pleases, and recover only so much as he can prove a title to.

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*Watts*, for the defendant in error. Even if the plaintiff in error be right in his leading position, that the mistake of the surveyor can, under the circumstances of this case, be recti-

(a) 1 *Munf.* 337.

(b) 2 *Hen. & Munf.* 164.

(c) 6 *Binn.* 102.

(d) 1 *Sergt. & Rawle*, 168.

(e) 2 *Johns.* 37.

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fied, it cannot be done in an ejectment brought for thirty acres of arable land, thirty acres of meadow land, and thirty acres of woodland, situate in *Dickenson* township, adjoining lands of *T. N., J. H., C. I., and E. G.* This is the manner in which the writ, and the description filed, are expressed; and it is much too loose and undefined, to enable the plaintiffs to recover a supposed surplus of thirteen acres, in the form of ejectment prescribed by the act of assembly. But it is not necessary to dwell upon any objection of this kind. When the land was conveyed by *Thomas Glen*, to his son *Alexander*, its limits must have been perfectly known. The deed refers to certain boundaries, which are always considered as indicating the land to be conveyed, and as entitling the grantee to every thing within their limits. The quantity which the area was supposed to contain, was, as is usual, mentioned; but what shews that the boundaries, and not the quantity, formed the essential part of the contract, is, that the words, "*more or less*" are introduced, which necessarily import uncertainty as to quantity. The survey was made according to these boundaries, by *Martin*, the agent of both parties, who found a number of marked saplings, and a fence exactly on the line. If this survey be abandoned, by what is the deed to be construed? A very trifling difference in the length of the chain, would make a difference of thirteen acres in two hundred, and perhaps the result of another survey would be, to diminish the number of acres which the tract is now supposed to contain. There has been probably, no mistake whatever; but admitting a mistake to have been committed, has the plaintiff a right to elect from what part he will take the surplus? Both the grantor, and the grantee, are now dead, and this ejectment is brought for the spot on which the widow of the grantee now resides. The quiet of titles, and public policy require, that after such a lapse of time, and after the death of the original parties, a survey made in the manner in which this was made, should not be disturbed. The *Pennsylvania* and *New York* cases, cited on the other side, particularly that of *Boar v. McCormick*, establish principles decidedly in favour of the defendant in error.

The opinion of the Court was delivered by

TILGHMAN C. J. The plaintiffs' counsel have founded their argument, on an assumption, that the deed of *Thomas*

*Glen* was intended to convey the exact quantity of 200 acres, with the allowance of six per cent, which was to be surveyed and ascertained, *after the execution of the deed*. This is certainly contrary to the expressions of this deed, which describes a tract of land, bounded in a certain manner, as the subject of the conveyance. The boundaries, indeed, are vague, and do not completely surround the land; but it must be supposed, that a tract of land did exist, known to the parties, otherwise the deed would convey nothing. And inasmuch as the description is incomplete, the tract intended to be conveyed, might be identified by parol evidence. The evidence was, that a tract, agreeing with the description in the deed, as far as it went, and completely ascertained by lines and boundaries, was delivered by the grantor, and accepted by the grantee. This is sufficient. But the plaintiffs contend, that the quantity of 200 acres, was an *essential* part of the deed. I can only say, that it is not so expressed. Two hundred acres *more or less*, are the words, which imply, that the boundaries were fixed, and might contain more or less. If the plaintiffs are right in their construction, this deed is not a conveyance of land, but an agreement that 200 acres shall be surveyed and conveyed. Now certainly, this Court should incline to the construction which corresponds with the declared intent of the parties; that is to say, the absolute conveyance of a tract of land. It may be, however, that the original intent was, to convey 200 acres, and through a mistake arising from miscalculation, such boundaries have been fixed, as contain 213 acres; How would the law stand, on that supposition? The boundaries being recognised by both parties, must be taken for those intended by the deed; and thus we have the case of a deed, containing 13 acres more than was supposed by either party; possession held for 13 years, and then, both grantor, and grantee being dead, an attempt to open the conveyance, for no other reason, than that it contained a surplus of 13 acres. Why were the words *more or less* used, but to shew, the understanding of the parties, that the boundaries should not be affected by a deficiency or surplus of quantity? Would a court of chancery interfere in a case of this kind? I think not. The surplus is not so great as to carry with it irresistible evidence of an essential mistake; and the death of the original parties, the only persons who had a perfect knowledge of what was really

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intended, is a strong circumstance against throwing open a transaction, with which both parties were content as long as they lived. The plaintiffs' counsel, having asked the opinion of the Court below, on a certain case, supposed by themselves to be matter of law, now complains, that the Court assumed what belonged to the jury. This is not fair. They would have had much better cause of complaint, and no doubt would have complained, if the Court had refused to give an opinion, and referred this matter to the jury. Upon full consideration of the plaintiffs' case, I cannot think them entitled to a recovery, upon principles either of law or equity; and therefore I am of opinion, that the judgment should be affirmed.

Judgment affirmed.

*/ BROWN and another against DOWNING and others.*

Friday,  
October 16.

IN ERROR.

ERROR to the Court of Common Pleas of *Cumberland* county.

The grantor in a deed is a competent witness to prove, that when he executed it he had no title.

One who has purchased land in his own name, but as the agent and trustee of another, to whom he afterwards conveyed the legal title, is a good witness to prove the trust.

The Court will not reverse a judgment for errors which an inferior Court may commit, in the course of a preliminary examination of a witness, which is totally unnecessary to his admission.

*John Downing* and others, the defendants in error, who were plaintiffs below, claimed the land for which this ejectment was brought, by virtue of an application, in the name of *John Downing*, their ancestor, dated *July 25th, 1767*, and a survey thereon of 150 acres, and allowance on *9th May, 1769*. The defendants derived their title, through several *mesne* conveyances, from *Alexander Power* to *John Kornegy*, and from *Kornegy* to themselves. In the course of the trial, the plaintiffs called *Alexander Shortis*, as a witness. He was objected to by the defendants' counsel, who produced a deed, dated *November 6th, 1811*, from *Shortis* to *John Kornegy*, for the land in question, and insisted, that he was incompetent to impeach a title which he had conveyed. To obviate this objection, the plaintiffs then offered him to prove, on the *voire dire*, that he had purchased the land, at a commission-

er's sale for taxes, at the request of *Kornegy*, and as a trustee for his use. To this, also, the defendants' counsel excepted, on the ground, that he was not a witness to prove his own agency, and that at all events, the evidence, if true, would not remove his incompetency. The Court over-ruled both exceptions, and having first heard the witness on the *voire dire*, permitted him to be sworn in chief.

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*Metzgar* and *Watts*, for the plaintiffs in error, contended, that to permit a man to destroy a title which he had himself conveyed, was contrary to policy and immoral, because the evidence which he was called upon to give, shewed that he was not worthy of credit, and the maxim, *nemo allegans turpitudinem suam audiendus est*, applied with as much propriety to a witness as to a party. Such evidence had never received the sanction of this Court. A grantor who has given no warranty and who consequently is not interested, is a good witness to support a title conveyed by himself. *Lessee of Gratz v. Ewalt*,<sup>(a)</sup> But that was a totally different case from this, in which the witness was called to overturn what he had been instrumental in setting up. The case of *Stewart v. Richardson*,<sup>(b)</sup> in which the law was stated clearly to be, that a vendor cannot by declarations made subsequent to his deed, invalidate or impeach the title he has created; and that of *Drum v. Lessee of Simpson*,<sup>(c)</sup> where it was held, that the declarations of the grantor to the grantee after the execution of a deed of trust, but before the acceptance of the deed by the grantee, and therefore before the title was complete, were evidence to alter or contradict the trust, go very far to shew, that the testimony of *Shortis* ought to have been excluded. He had made an absolute conveyance of the title to one under whom the defendants claimed, and if the declarations of the grantor, subsequent to the deed, are not admissible to invalidate his own acts, on what principle can this be done, by the testimony of the grantor himself?

If the witness was incompetent, independently of the alleged trust, he ought not by his own testimony, to have been permitted to prove himself a trustee, and thus render himself competent. In commercial cases an agent is often allowed, from necessity, to prove the authority under which he acted; but the rule is by no means universal, and in the case of *An-*

(a) 2 Binn. 95.

(b) 2 Yeates, 91.

(c) 6 Binn. 478.

1818. *derson v. Hayes*,<sup>(a)</sup> the Court refused to admit such evidence, declaring, that in general it would be highly dangerous to permit an agent to establish his authority by his own oath, and that there would be no security against bad men, if so broad a principle were adopted. The rule, however, is confined to mercantile cases, and does not extend to sales of lands. *Lessee of Nicholson v. Miffin*.<sup>(b)</sup>

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and others.

*Carothers*, for the defendants in error, answered, that whether *Shortis* was to be viewed in the light of a trustee for *Kornegy* or not, he was a perfectly good witness. He was not called in order to contradict his deed, to which alone he was incompetent, but to prove, that he had not a good title when he executed it, and for this purpose, he would have been competent, provided he was willing to be sworn, even if he had given a general warranty, because he would have been swearing against his own interest. The point now raised, is neither new nor difficult. The exclusion of a witness, whose testimony tends to destroy an instrument to which he has affixed his hand, has been repeatedly decided to be confined to negotiable instruments. In *Baring v. Shippen*,<sup>(c)</sup> the assignor of a bond was permitted to prove, that he had obtained it fraudulently. In the *Lessee of Thompson v. White*,<sup>(d)</sup> the Court received the evidence of the grantor in a deed, to shew a breach of trust and a fraud in law in his immediate grantee, to whom the land had been conveyed in confidence, that he would dispose of it in a particular manner, which he failed to do; and in *England*, the very point now in controversy was decided by Chief Justice HOLT, in the case of *Title v. Grevett*.<sup>(e)</sup> It is an objection which goes to the credibility of the witness merely. *Phill. Ev.* 33, 34.

Even if the Court below were wrong in the opinion, that *Shortis* was a proper witness to prove his own agency, it is not the subject of a bill of exceptions; because, being competent to establish the main point, independently of his character of trustee, no injury could have arisen from the supposed error. But their opinion on that point was correct. A witness may testify to a verbal power given him, but he cannot, by his own evidence, prove a written power. *Phill. Ev.* 96.

(a) 2 Yeates, 95.

(b) 2 Yeates, 38.

(c) 2 Binn. 154

(d) 1 Dall. 425.

(e) *Ld. Raym.* 1008.

The opinion of the Court was delivered by

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GIBSON J. It did not require the preliminary evidence of the witness, on his *voire dire*, to get rid of the exception to his competency. The maxim, that a person alleging his own turpitude is not to be heard, does not apply to witnesses. Approvers and accomplices, are constantly witnesses, although they inevitably implicate themselves in the guilt they are called to fix on the accused ; and their avowed participation in moral turpitude goes, not to their competency, but their credibility. In civil actions, the principle is the same: A witness to the execution of a will may be received to prove the insanity of the testator, at the time of signing. *Wright, dem. Clymer v. Little*, 3 Burr. 1244. *Lowe v. Joliffe*, 1 Bl. Rep. 366. The attesting a will, under such circumstances, certainly involves the witness in as great dishonesty as can fairly be imputed to a man voluntarily appearing to disprove a title he had conveyed. But the very case was decided in *Title v. Grevett*, 2 Ld. Raym. 1008. In fact, the doctrine of estoppel has never been applied to witnesses, except in the solitary instance of a person putting his name to a negotiable instrument, and thereby giving it credit with the public. Although the eminent Judge, to whom that rule owes its existence, professed to found it, as well on the civil law maxim, as the protection of negotiable papers, yet the latter is the ground on which it is sustained in *Pennsylvania*, and those states in which it is still retained, and accordingly we find it restrained to securities strictly negotiable. In *England* it is exploded altogether. In transactions strictly mercantile, where credit performs the office of money, there is sound reason for protecting paper, that approaches very near to a circulating medium ; but the protection ceases with the reason on which it is founded. Undoubtedly, a witness voluntarily appearing in a court of justice to attest facts, that at once evince his turpitude and destroy his credit, is a sad and disgusting spectacle ; yet I do not know, that on that account merely, a party ought to be deprived of the benefit of his testimony, when the interests of justice may be subserved by it.

With respect to the second point, even if it were the subject of error, I am of opinion the Court below were right. Whether or not, in buying in the land, *Shortis* were the agent of *Kornegy*, was totally immaterial. His getting rid of the objection to his competency, even if well founded in the first

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instance, did not depend on the establishing of an agency under *Kornegy*. The witness was admitted to prove he purchased as a trustee for *Kornegy*, and with his assent; and that although by his deed he transferred the legal title, yet, that he never had a beneficiary interest in the land. But as *Shortis* was unquestionably a witness, without the aid of the matters disclosed on his *voir dire*, no errors the Court might have committed, in the course of a preliminary examination, totally unnecessary to his admission, and therefore irrelevant, could be assigned here, because those errors could prejudice no one. A judgment will not be reversed because the Court gave an erroneous instruction to the jury on an immaterial point. *Murrel v. Johnson's administrator*, 1 *Hen. & Munf.* 451; nor for admitting illegal evidence, unless the plaintiff in error could possibly have received some injury from it; as where incompetent evidence of a fact has been admitted, but the same fact has been conclusively proved by a verdict and judgment between the same parties, in which the fact was litigated and put in issue. *Preston v. Harvey*, 2 *Hen. & Munf.* 55. Here the inquiry of the witness having purchased as an agent or trustee, was altogether unnecessary to the decision of the question of competency; and, therefore, if it had been conducted erroneously, the rule would apply. Was *Shortis*, at all events, a witness? If he was, the plaintiff in error cannot complain of the manner of his admission.

Judgment affirmed.

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BOVARD and wife *against* WALLACE and another, administrators, *pendente lite*, of WALLACE, deceased.

IN ERROR.

Friday,  
October 16.

THIS was a writ of error to the Court of Common Pleas of Cumberland county, in a feigned issue directed by the Register's Court to try the validity of a writing, purporting to be the testament and last will of *Patrick Wallace*, deceased, in which *Sarah Wallace* and *Thomas Wallace*, administrators, *pendente lite*, of *Patrick Wallace*, were plaintiffs, and *Charles Bovard* and *Rachael*, his wife, who was one of the heirs of *Patrick Wallace*, were defendants. The jury, having found a verdict establishing the will, the cause was removed to this Court by writ of error, where two exceptions, founded on the rejection of testimony, by the Court below, were taken and argued, by

*Metzgar* and *Carothers*, for the plaintiffs in error.

*Parker* and *Watts*, contra.

Every thing necessary to the understanding of the points decided, will be found in the opinion of the Court, which was delivered by

TILGHMAN C. J. The trial of this cause, in the Court below, was upon a feigned issue directed by the Register's Court of Cumberland county, to try the validity of a writing, purporting to be the testament and last will of *Patrick Wallace*, deceased.

Two exceptions were taken to the opinion of the Court.

1. The defendants offered to prove, that *Ann Wallace*, one of the devisees in the supposed will, had declared, that the testator, at the time of executing that writing, was incapable of making a will. This evidence was objected to by the counsel for the plaintiff, and rejected by the Court.

This question is not new. It came before the Court at Lancaster, in the case of *Miller v. Miller*,<sup>(a)</sup> where it was decided, that the declarations of a devisee under similar cir-

On the trial of a feigned issue of *devisavit vel non*, the declarations of a devisee, not a party to the suit, cannot be received in evidence to invalidate the instrument set up as a last will.

A witness, to refresh his memory, may, with the consent of the parties, read a copy of a deposition to which he has formerly sworn. But if the contents of a paper, purporting to be a copy of the former deposition, be copied into the deposition he is about to make, and he swear to it without recollecting at the time all the matters contained in the former deposition, it cannot be received in evidence. But the answers of the witness to the questions put by either party, at the time of taking the last deposition, are evidence.

<sup>3</sup>  
(a) *Serg. & Rawle*, 260.

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WALLACE  
and another  
administrators  
pendente lite  
of WALLACE,  
deceased.

cumstances, were not evidence. The reasons for this opinion will be found in the case referred to, and therefore need not be repeated now.

2. The deposition of *Sarah Longwell* was offered in evidence on the part of *Bovard* and wife, the defendants in the issue. This deposition was taken under a rule of Court, during the trial, before *Isaac Todd*, a justice of the peace, in presence of *Thomas Wallace*, the plaintiff, and *Charles Bovard*, the defendant. It appears, that the deposition of the same witness, had been taken before, and was lost. *Bovard* put into the hands of *Todd*, a paper, which he said was a copy of the last deposition, and this paper was copied into the present deposition, after which, questions were put to the witness both by *Bovard* and *Wallace*; the answers to which were taken by *Todd*, and inserted in the present deposition. The counsel for the plaintiff objected to the whole of this deposition, except the answers to the questions put by *Wallace*; and the Court decided in favour of the objection.

As to that part of the present deposition, which was nothing but a copy of the one which was lost, it was right to strike it out, because there was reason to suppose, from the evidence of Mr. *Todd*, that the witness did not pretend to recollect all the matters set forth in her former deposition. She ought to have been examined over again, and her answers taken according to her *present* recollection, although she might have been permitted, with the consent of the parties, to have the first deposition read to her, for the purpose of refreshing her memory. But as to the answers given to the questions put to her, at the time of taking the present deposition, I cannot perceive why they should not be good evidence. The Court below permitted the answers to *Wallace's* questions to be read, but struck out the answers to *Bovard's* questions. For this, I am at a loss to find a reason, and it seems so extraordinary, that I cannot help conjecturing, that when it was decided, that every thing but the answers to *Wallace's* questions should be struck out, the Court did not advert to the answers which had been given to the questions put by *Bovard*. Those questions were lawful, and what weight the answers might have had with the jury, it is not for us to say. They ought to have gone to the jury, and the not suffering of them to go, was error. I am, therefore, of opinion, that the judgment should be reversed, and a *venire facias de novo* awarded.

DUNCAN J. gave no opinion, having been counsel for the plaintiffs in error. 1818.

Judgment reversed, and a *venire facias de novo* awarded.

Chambersburg.

BOVARD and Wife

vs.  
WALLACE and another administrators *pendente lite* of Wallace deceased.

BRANTYAN *against* FLICKENGER.

IN ERROR.

Friday, October 16.

EJECTMENT in the Court of Common Pleas of Cumberland county.

The opinion of the Court, which was delivered by the Chief Justice, embraces the whole case, so far as it is connected with the point decided.

Carothers, for the plaintiff in error.

Metzger and Watts, for the defendant in error.

A warrant issued since the act of 22d September, 1794, for land, on which grain has been raised, but no settlement made with a view to residence and the support of a family, is illegal, and vests no title.

If however, an improvement be begun, and grain raised in contemplation of following it up by residence, and this design be persevered in, according to law, the title will relate to the commencement of the improvement.

TYLOHMAN C. J. Henry Branyan, the plaintiff below, claimed under a warrant to himself, for the land in dispute, dated, 7th December, 1807; by virtue of which, a survey was made, the 14th April, 1808, containing 16 acres, and 154 perches. It appeared in evidence, that for several years prior to the date of the plaintiff's warrant, he had rented and lived upon an adjoining tract of land, but had taken into cultivation, and raised grain upon, part of the land in dispute, which was then vacant. The President of the Court of Common Pleas, in his charge to the jury, told them, "that before a warrant could legally issue, it was necessary, that grain should be raised with an intent to make a settlement; that is to say, with intent to reside on the land, and support a family." To this opinion, the counsel for the plaintiff excepted.

By the act of the 22d September, 1794, it was enacted, "that no application should be received at the land office, for any land within the Commonwealth, except for such land, whereon a settlement had been or should thereafter be, made,

1818. *grain raised, and a person or persons residing thereon."* In order to constitute a *settlement*, there must be a residence on the land, with an intention of making it a place of abode, and the means of supporting a family. The legislature has manifested great anxiety to have the vacant lands *settled*, and for that purpose, has given, not only a preference, but an exclusive preference, to such persons as should reside on the land with their families. But there must be no trick, or evasion, and in order to make the matter more sure, *grain must be raised*, before the issuing of the warrant. This raising of grain, is inseparably coupled with a settlement, or an intent to make a settlement. It will be sufficient, if it be raised in contemplation of following it up by residence; for it is often very convenient to make a crop, before the family come to reside on the land. But to take possession of vacant land, and raise grain, without an intent to make a settlement, so far from being authorised by law, is a *trespass*. It deserves no favour, because it contravenes the object of the legislature, by preventing settlers from coming on the land. There can be no commencement of legal title, without some act on the land, with a view to residence and the support of a family; and the first stroke of the axe, or furrow of the plough, with these views, is the commencement of a settlement, which, if persevered in according to law, will end in a good title. This is the true construction of our act of assembly. The charge of the President was therefore perfectly right, and the judgment should be affirmed.

Judgment affirmed.

1818.

Chambers-  
burg.Lessee of DELANCY *against* LITTLE and another.

IN ERROR.

Friday,  
October 16.WRIT of error, to *Franklin* county.

In the Court below, it was an ejectment, brought by the plaintiff in error, against the defendants in error, in which the verdict was in favour of the defendants.

*Watts*, for the plaintiff in error.

*J. Riddle* and *Crawford*, for the defendants in error.

The only point agitated in this Court, is fully explained, in the opinion delivered for the Court, by

A witness may be permitted to swear for whom an application was intended, by the person, who put it into the land office. Whether he speaks from such knowledge, as will entitle him to belief, is a matter, of which the jury are to judge.

TILGHMAN C. J. Both plaintiff and defendants, claimed under an application entered, 3d *March*, 1767, in the name of *Barbara Zantzinger*. This application was put into the land office, by *Charles M'Cormick*, under whom the plaintiff claimed; and it was put in, as the plaintiff contended, for *M'Cormick's* own use. On the other hand, it was contended on the part of the defendants, who claimed under *Barbara Zantzinger*, that the application was for her use. The defendants offered, in evidence, the deposition of *Paul Zantzinger*, who swore, that the tract of land in dispute, was located by *Charles M'Cormick*, in the name of *Barbara Zantzinger*, in the land office, and that the same was intended for the use of the said *Barbara Zantzinger*, only. The counsel for the plaintiff, objected to the words, "and that the same was intended for the use of the said *Barbara Zantzinger*, only," and prayed the Court, to strike them out of the deposition. But the Court was of opinion, that these words should not be struck out, and to this opinion, the counsel for the plaintiff, excepted. In support of this exception, it has been argued, that the intention of *Charles M'Cormick*, being confined to his own breast, was not a fact to which the witness could swear. This is a very subtle argument, but I cannot say, that I feel the force of it. A man's intention,

1818.  
*Chambers-  
burg.*

*Lessee of  
DELANCY  
v.  
LITTLE  
and another.*

may be manifested, by his *words* or his *actions*, and when known, may be sworn to with as much certainty, as any other fact. When a witness undertakes to swear to a thing of that kind, the jury, who hear the oath, will value it at what it is worth. The plaintiff might have asked *Paul Zantzinger*, how he knew *M. Cormick's* intention, and unless he could have accounted for his knowledge, his credit would have been destroyed. But it was a question of credibility only, and therefore, instead of asking the Court, to strike out the evidence, the plaintiff's counsel, should have addressed themselves to the jury, and endeavoured to satisfy them, that this part of the testimony, was unworthy of credit. I am of opinion, that there was no error in the decision of the Court of Common Pleas, and therefore, the judgment should be affirmed.

DUNCAN J. took no part in the decision, having been concerned for the plaintiff in error.

Judgment affirmed.

END OF SEPTEMBER TERM, 1818.

# CASES

IN THE

## SUPREME COURT

OF

### PENNSYLVANIA.

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EASTERN DISTRICT, DECEMBER TERM, 1818.

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The Commonwealth *against* the Keeper of the Jail of  
*Philadelphia.*

1818.  
Philadelphia.  
Wednesday,  
December 16.

FROM the return to a *habeas corpus*, which issued to the defendant, on the application of *James Connor*, it appeared, that the prisoner was detained, by virtue of a commitment, by alderman *Badger*, dated *November 19th, 1818*, for want of security to appear at the next Mayor's Court for the city of *Philadelphia*, there to abide the determination of the said Court, on a charge of having deserted his wife and child, leaving them a burthen upon the guardians of the poor.

*Connor*, became an enlisted soldier, in the army of the *United States*, on the 6th *November, 1818*, on which ground, *C. F. Ingersoll*, claimed his discharge. He relied on the *Constitution of the United States*, art. 1. sect. 8. clause 12. *The Commonwealth v. Murray.* (a) *The Commonwealth v. Barker.* (b) *Act of Congress of 16th March, 1802.* (c) 3 *Bl. Com.* 161. *Commonwealth v. La Caze.* (d)

(a) 4 *Binn.* 492.

(b) 5 *Binn.* 428.

(c) 3 *Laws of the U. S.* 456.

(d) 2 *Dall.* 123.

The act of congress, of 16th March, 1802, prohibiting the arrest of soldiers for any debt under the sum of 20 dollars, contracted before enlistment, or for any debt, contracted after enlistment, does not extend to a soldier committed by an alderman, for want of security, to appear at the Mayor's Court, to answer a charge of having deserted his wife and family, and left them a charge on the guardians of the poor.



1818. *Ewing*, contra, referred to the act of assembly, of 31st Philadelphia. March, 1812.(c)

The Commonwealth.  
v.  
The keeper  
of the jail of  
Philadelphia.

The opinion of the Court was delivered by

TILGHMAN C. J. The prisoner claims his discharge from imprisonment, by virtue of the act of congress of the 16th March, 1802. The 23d sect. of this act, provides, "that no non-commissioned officer, musician, or private, shall be arrested, or subject to arrest, or to be taken in execution, for any debt under the sum of 20 dollars, contracted before enlistment, nor for any debt contracted after enlistment." The meaning of this provision, appears to be confined to debts, taken in their common acceptation, created by contract between the soldier, and any other individual. And there was great reason for preventing an arrest in such cases; because, if permitted, every soldier might be withdrawn from the army, by contracting a debt, for that purpose. But it never could have been intended to prevent arrests in all cases of debt. Suppose, for instance, a soldier should forfeit a recognisance entered into, for keeping the peace, or for his appearance in Court, to answer a charge of felony. This would be a debt, and yet it cannot be supposed that congress meant to protect him. Neither could it have been intended to protect him against execution on judgments, in actions founded on trespass, or *tort*. Yet these judgments are debts. Let us consider then, the cause for which the prisoner was committed by alderman *Badger*. It is not for any debt of any kind; he has made a contract with no person whatever. But he has been charged with a breach of duty, in deserting his wife and child, without providing any means for their support. In such case, the law of this Commonwealth has invested the Mayor's Court, with power to enquire into the circumstances of the case, and make such order as they shall judge proper; and unless security be given for compliance with that order, the husband so deserting his family, may be imprisoned. Every alderman also has power, on complaint made to him, that any man has deserted his family, to take security of the person complained of, for his appearance at the next Mayor's Court; and for want of such security, to commit him to prison. The law considers a desertion of this kind, as an offence; not indictable indeed, but punishable by

(a) *Ford. Ab.* 441. 455.

imprisonment, unless security is given, to comply with the order of the Court. Whether the prisoner has been guilty of this offence, is not now to be decided. The Mayor's Court, no doubt, will do him justice. But the question before us, is, whether he shall be compelled to stand his trial, or suffered to escape, and leave his family, a charge on the public. On that question, the Court has no doubt. It is our opinion, that the case of the prisoner does not come within the words, or meaning of the acts of congress, and therefore, he must be remanded.

1818.

*Philadelphia.*The Commonwealth  
v.The keeper  
of the jail of  
*Philadelphia.*

Prisoner remanded.

### The Insurance Company of Pennsylvania against PASS-MORE and another.

Thursday,  
December 17.

**RANDALL**, for the defendants, obtained a rule to shew cause why the judgment entered in this case, should not be opened, and the execution set aside. It appeared, that shortly after *March Term*, 1818, a summons issued against the defendants, returnable on the last *Monday in July*, which was returned, "served," and on the 4th *August* following, the plaintiffs' attorney signed a judgment for want of an appearance..

The last Monday in July is merely a Court to receive the return of writs, and to make rules and orders preparatory to trials. It is not a Term, at which a judgment can be taken for want of an appearance.

**Rawle**, for the plaintiffs, shewed cause. He reviewed the several acts of assembly by which the original jurisdiction of this Court has, from time to time, been regulated, particularly that of the 10th *April*, 1807, the 8th section of which declares, that the last *Monday of July*, shall be a common day of return for the Supreme Court of the Eastern District, at which time all writs and process may be returnable in the same manner as at the regular terms of the said Court, and may also bear teste on the same day. It had been the practice, he contended, to consider *July* as a regular Term of the Court, for many important purposes. Sheriffs' deeds were then acknowledged; in case of appearance, a rule to plead might be taken; and for default of appearance on a *capias*, returnable to *July*, the bail-bond might be put in suit. To establish the practice of taking judgments for want of an appearance, he

1818. referred to the records of ten cases in which it had been done, and insisted, that it lay on the opposite party to shew cases of judgments taken at *December Term*, for defaults in *July*. A practice of five or six years under an act of parliament, where it is general, and the consequences of altering it would be important, fixes the construction. *Regina v. Balkios, &c. de Bewdly.*(a)

*Philadelphia.*  
The Insurance  
Company  
of Pennsylv-  
ania  
v.  
PARKER  
and another.

For the defendants it was answered, that the practice had not been to consider *July* as a *Term*; that it was not so counted in foreign attachments; that the general impression of the bar was, that judgments by default could not be entered at *July*; that the cases cited by Mr. *Rawle*, were all *scire facies*, and in several of them, the proceeding was amicable, and the judgment by consent; and that if they had been cases of summonses, they were not sufficiently numerous to establish a practice. That the words of the act, merely made the last *Monday* in *July*, a day of return and teste of writs, and not a *Term*; that one Judge only sat, for the purpose of making rules and orders preparatory to trials, without the power of giving judgments; and that when verdicts were taken between *March* and *July*, judgment was never entered until *December Term*. The Chief Justice, in *July* last, refused, on motion, to enter a judgment in a foreign attachment. He cited *Shaw v. Pearce*,(b) and *Kearney v. McCullough*,(c)

By THE COURT. We do not think, that the practice has been by any means so general, as to induce the Court, from an apprehension of shaking property, to depart from the obvious meaning of the law. The last *Monday* in *July*, is a Court held by one Judge, for special purposes, to receive the return of writs, and to make rules and orders preparatory to trials. But there is no power to give judgments. No instance has been shewn, of a Judge ever giving judgment on that day, but several have been cited, where it has been refused. The cases of judgments cited, are all the acts of attorneys, *sub silentio*, and there are but few of them. It is, therefore, our opinion, that the rule in this case should be made absolute.

Rule absolute.

(a) 1 P. Wms. 212.

(b) 4 Binn. 485.

(c) 5 Binn. 309.

1818.

Philadelphia.GAUSE *against* WILEY.

IN ERROR.

Saturday,  
December 19.

THIS case came before the Court, on a writ of error, to the Common Pleas, of *Chester* county, in which it was an ejectment, brought by *Caleb Wiley*, against *William Gause*. The opinion of the Court below was returned with the record, unaccompanied by any bill of exceptions, or statement of facts. It was as follows:

WILSON President. "The title to the lands, demanded in this action, appears to have been vested in *Caleb Prew*, in fee simple. The plaintiff claims the land upon the ground, that by the will of *Caleb Prew*, an estate tail was devised by him, to his daughter *Susanna*, the plaintiff's mother, which on her death, descended to the plaintiff, as the heir in tail. The words of the will are these:—He bequeaths all his personal estate, to his wife, "together with full liberty to possess and enjoy, one moiety or half part of all my real estate, during her natural life, and at the expiration thereof, I then order the place whereon I now dwell, to my daughter *Susanna*, she paying two thirds of the value thereof, to her two sisters, viz. *Sarah*, and *Mary*; and the land I lately purchased of *Rees Thomas*, adjoining to my former, containing 112 acres, also, I give and bequeath to my daughter *Betty*, to be inherited by her, and her heirs, lawfully begotten of her body; and if either of my said children die without issue, that then, the inheritances to descend to the next elder, dividing the value equally amongst the survivors, or the lawful heirs of them; all my said land, to descend to the lawful heirs from generation to generation."

"Some observations were made in the course of the argument of the plaintiff's counsel, upon the interest devised to the testator's widow. He contended, that she took an estate for life, in all the land of her husband, by implication. It is immaterial in the present cause, whether she took an estate that the executor should be made a party to the suit, or at least should have notice, appear and plead.

If an estate tail, charged with the payment of a legacy, be sold under an execution, for the purpose of raising the legacy, a fee simple passes to the purchaser.

Devise, "I order the place whereon I now dwell, to my daughter *S*, she paying two thirds of the value thereof, to her two sisters, *S*., and *M*., and the land I lately purchased of *R. T.*, I give and bequeath to my daughter *B*, to be inherited by her and her heirs lawfully begotten of her body; and if either of my said children die without issue, that then the inheritance is to descend to the next elder, dividing the value equally amongst the survivors, or the lawful heirs of them; all my said land, to descend to the lawful heirs, from generation to generation."

*S*., took an estate tail. A personal action may be sustained in the common law Courts of Pennsylvania, for the recovery of legacies charged upon land. It seems with liberty to

1818.  
*Philadelphia.*

GAUSE  
v.  
WILEY.

for life, in only a moiety of the lands, according to the express words of the will; or, an estate for life, in the whole, by implication. She has been long dead; before the memory of a witness, who is now 73 years of age. *The question is, what estate is given to Susanna Prew, the testator's daughter?* And I think it clearly an estate tail. By the first words of the devise, by which he orders the place he lives on, to his daughter *Susanna*, she paying two thirds of the value thereof, to her two sisters, if the will had stopped, an estate, in fee simple, would most probably have passed; but it is made an estate tail, by the subsequent limitation of the estate to others, on the event of her dying without issue. If land be devised to a man, and his heirs forever, but if he dies without issue to another person, it is an estate tail. The defendant's counsel remarked, that the testator could not have intended to give to *Susanna*, an estate tail, because, he devises land to his daughter *Betty*, expressly in tail, *to her, and her heirs, lawfully begotten of her body*, and could not have meant to give the same estate, to *Susanna*, when he has used very different language with respect to her. But I draw an opposite conclusion from that part of the will. The estate tail is devised to *Betty*, in language even technically correct, and it is apparent, that the same kind of estate, was intended to be given to *Susanna*, because both estates are devised over upon a similar event; that is, upon the death of the respective devisees, without issue, and must therefore have been designed to be alike.

“ That estate tail, has descended to *Caleb Wiley*, the plaintiff. Estates tail do not descend in *Pennsylvania*, in the same manner as estates in fee simple, to all the children, but descend, according to the rules of the common law; and *Caleb Wiley*, appears to be the eldest son of *Susanna*. The plaintiff's title being thus established, he is entitled to recover, unless the defendants have shewn that the estate tail has been barred.

“ It is not contended, that the estate tail has been barred by any of the usual and regular modes; but it is said, that there are reasons, arising from the several facts which have been given in evidence, to prevent the plaintiff's recovery.

“ 1. That the action commenced at *May Term, 1745*; by “ *Sarah and Mary Prew*, against *William Wiley*, and *Susanna*, his wife, late *Susanna Prew*, daughter and devisee, in

the last will and testament of *Caleb Prew*, deceased," was brought for a debt due by *Caleb Prew*, and that therefore, a fee simple passed to the purchaser at sheriff's sale, under the execution issued in that suit.

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"If the land was sold for the debt of *Caleb Prew*, his right to the land, which was a fee simple, would pass to the purchaser. But the action referred to, cannot be considered as for a debt due from him. It is incumbent on the defendants, to shew that it was for such a debt. It cannot be presumed to have been so, without some circumstances to justify the presumption. There is not only no evidence of it, but it is contrary to all probability; for an action will not lie in *Pennsylvania*, against a devisee, for a debt of the devisor. The English statute, which gives such an action, for debts of a particular description, is not, and never was, in force here; and by the common law, the action could not be maintained. Nor is this action brought, in the manner directed by the statute, against the heirs and devisees. Unfortunately, no declaration appears to have been filed in the cause. But when it is considered, that for the reasons mentioned, the action could not be for a debt of *Caleb Prew*; and when we have evidence, from the will of *Caleb Prew* itself, of a claim of *Sarah* and *Mary Prew*, against their sister *Susanna*, as devisee, we may infer, the action was for that. At any rate, it is incumbent on the defendants to shew, that it was not for that, but for a debt of *Caleb Prew*.

"2. It is said, that the plaintiff is barred by the statute of limitations. I do not think, that he is barred by the statute, because, there has been no *adverse possession*. If the action in 1745, had been for a debt of *William Wiley*, the husband of *Susanna Wiley*, only his interest in his wife's land could be sold, and consequently, the estate of the purchaser at sheriff's sale, would have been at an end on his death, which happened, in 1784. But the action being for a debt of the wife, her interest in the land, was liable to be sold, for it was not released by her marriage, from the claims of her creditors. Her issue however, would not be barred from claiming the land, on her death.

"It might be made a question, what was the nature of the estate, acquired by the purchaser at sheriff *Owen's* sale; whether it was an estate, strictly for the life of *Susanna Wiley*, or an estate in fee, liable to be defeated by the issue

1818. in tail, on her death, which will be considered on a subsequent point in this cause. Whichever of these estates passed to the purchaser, he acquired a lawful estate, which was good and indefeasible, during the life of *Susanna Wiley*. The possession therefore, of the purchaser at sheriff's sale, and of those who have succeeded to it under his title, has never been adverse to the estate tail, but has been under a right derived from it, and a part of it. *Susanna Wiley* could claim nothing during her life, for all her interest had been transferred by the sheriff's deed; and the issue in tail could not enter or claim until her death. I give no opinion on the question, whether, when the statute has run against and barred one heir in tail, a succeeding heir in tail, is likewise barred. That question, does not arise in this cause. A good and indefeasible estate existed during the life of *Susanna Wiley*, and the statute never began to run, until her death, which was only about three years ago.

*Philadelphia.*  
GARDNER  
v.  
WILEY.

"3. *William Wiley*, the purchaser at sheriff *Owen's* sale, empowered his executors to sell the land now in dispute, who accordingly exposed it to sale, and *Caleb Wiley*, the present plaintiff, became the purchaser, and received a conveyance in fee simple, from the executors. It is alleged, that by that conveyance, he is estopped from claiming the estate tail. My opinion is, that he is not estopped by that deed. There was at that time, a good estate existing, of which the executors might dispose, and which the plaintiff might purchase, as well as another person. It was indefeasible, during the life of *Susanna Wiley*, though liable to be defeated, by the issue in tail, on her death. That estate passed to him, by the deed of the executors; but he was not thereby prevented from taking the benefit of the good title to an estate tail, which descended to him on a subsequent event. There was no adverse title existing at the time, to bring this case within the principle of that cited from 10 *Johns. Rep.* 292.

"4. It is urged, that *Caleb Wiley* at least, cannot recover this land, even if the next heir in tail may, after his death; because, all his right in the land, was sold by sheriff *Leonard*, on an execution issued against him, at the suit of *William Phillips*, and was conveyed by the sheriff, to *Joshua Bailey*.

"The sale by the sheriff, was in 1789, during the life of *Susanna Wiley*, who died in 1814. On this point, we must

consider what estate *Caleb Wiley* had, at the time of that sale, and what the sheriff is empowered by law to sell. 1818.

*Philadelphia.*

“The estate which *Caleb Wiley* had, at the time of sheriff *Leonard’s* sale, was only that which had been conveyed by sheriff *Owen’s* deed, to *William Wiley*, and by *Wiley’s* executors to him. That estate was good, only during the life of *Susanna Wiley*. I do not think that it was merely an estate for the life of *Susanna Wiley*. It was a base fee, liable to be defeated on her death, by the heir in tail. That is held to be the estate conveyed by a bargain and sale, made by a tenant in tail; and the reasons assigned for that decision, appear to apply with equal force, to a conveyance by the sheriff, of all the right of the tenant in tail.

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“That estate was all that could be sold by the sheriff, who is empowered to levy on and sell, only such estate as the debtor then has, and cannot sell a right not then vested in him, but which *he may possibly acquire on the death of his ancestor*. The right which he might have, as heir in tail, was not an interest which could be taken in execution during the life of the ancestor. During the life of the ancestor, the whole estate is vested in him; and there is no interest whatever, existing in the heir. This is the case, with respect to the heir in tail, as well as the heir general.

“The estate then, conveyed by sheriff *Leonard*, being good and indefeasible, only during the life of *Susanna Wiley*, who was dead before the commencement of this action, and the right of *Caleb Wiley*, as the heir in tail, not being liable to be taken in execution and sold, he is not now prevented from claiming that right, and putting an end to the defeasible estate, granted by the sheriff.

5. “The circumstance, that improvements have been made on the land by *William Gause*, will not prevent the plaintiff’s recovery. He was not bound to tender to *William Gause*, the value of those improvements.

“The verdict should be for the plaintiff.”

*Binney*, for the plaintiff in error. The first question which this case presents is, what estate did *Susanna Prew* take under her father’s will? By the first words of the devise, a fee simple was given, and if it was converted into an estate tail, it was by force of the subsequent words, which made it one merely by implication, if at all. Such, however, is not the

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1818. true construction of the will. The land was to go to *Susanna*,  
*Philadelphia* charged with the payment of two-thirds of its value to her  
 GAUSE sisters *Sarah* and *Mary*, and as no other property was devised  
 TO her, she possessed no other means of discharging the in-  
 WILEY. cumbrance than a sale of the estate. If, therefore, she took  
 a less estate than a fee, it is plain she would be a loser, which,  
 as a devise always imports a benefit, brings her within the  
 rule, that where there is a possibility of loss in taking a  
 smaller estate, the devise is to be construed to give a fee.  
 8 Vin. 222. *Devise*, pl. 2, 3, 4. 6, 7. 17, 18. It cannot be  
 supposed, that the testator intended, that if *Betty* or *Susanna*  
 died without issue, the survivor was to have all the land, and  
 thus cut off the other two daughters from all share of it.  
 This construction would give to the issue of one, if the other  
 died without issue, the whole of his real estate, while two of  
 his daughters, the immediate objects of his bounty, are yet  
 alive. As the will expresses no such intention, the Court will  
 not suppose he intended to commit such an absurdity. The  
 meaning of the testator was, that *Susanna* should take a fee  
 simple, provided she paid two-thirds of the value of the land  
 to her two sisters, and if she did not pay, that it should go  
 over; or it may be construed, that she took a fee with an ex-  
 ecutory devise over, in case of her death without issue, in  
 the life-time of either of her sisters. *Moone v. Heaseman*. (a)  
 The words *next elder*, create a contingency on which the  
 estate is to go over; and refer to the one, who shall be next  
 in point of age to *Betty* or *Susanna*, at the time of the death  
 of either of them; for it does not appear, what were the ages  
 of the four sisters in respect to each other. If *Susanna* took  
 a fee with an executory devise over, the plaintiff below could  
 not recover, because he claimed as heir in tail.

But admitting that *Susanna* took an estate tail, the result is  
 the same. Judge WILSON supposes the suit brought to *May*  
*Term*, 1745, against *William Wiley* and wife, in consequence  
 of which the land was sold, to have been instituted by *Sarah*  
 and *Mary* for the recovery of their portions, under their fa-  
 ther's will. In this he was doubtless correct, but in the opi-  
 nion, that the estate tail was not affected by the sale, he was  
 wrong. That *Caleb Prew* intended to charge the land with  
 the portions of his two daughters, there can be no doubt.  
 The legacy was not of a specific sum of money, but had ex-

(a) *Willes*, 138.

press reference to the land, being two-thirds of the value thereof; and what shews explicitly, that such was his intention, if further proof were necessary, is, that in case of the death of *Susanna* or *Betty*, the land was to go to the next elder, *dividing the value*, among the survivors or their heirs. If *Susanna* had died, without having paid the money, and had left no other estate, were her sisters to lose their legacy, while her issue enjoyed the land? That could not have been the intention of the testator, nor would it have been in accordance with any principle of equity. By the devise to *Susanna*, she paying two-thirds of the value of the place to her two sisters, a charge on the land was created in favour of those sisters, in addition to *Susanna's* personal liability arising from her acceptance of the devise, and her entry in pursuance of it. For the purpose of raising these portions, chancery would have ordered the money to be raised out of the estate, without regard to the entail; for if the estate tail does not give way to the legacies, the will is defeated. Nor would they have called in the issue in tail. Where an estate is charged, a court of equity will decree the whole to be sold, in favour of creditors, legatees, or portions for younger children, even where there is a strict settlement. A charge created by a testator, is an incumbrance on his own estate, and consequently when it is sold, it is the estate of the testator, in the hands of the devisee, which passes to the purchaser, and not the estate of the devisee. Hence it follows, that if lands held in *Pennsylvania* in fee simple, be devised in tail, subject to a charge, and be sold under an execution in a suit to recover the money charged, a fee simple passes to the vendee. He cited, 4 *Vin.* 463. *Charge*, D. pl. 21. 4 *Vin.* 451. pl. 3. *Cloudsly v. Pellham*.(a) *Wareham v. Brown*.(b) *Webb v. Webb*.(c)

The plaintiff below was not entitled to recover on another ground. *Sarah* and *Mary*, to whom two-thirds of the value of the land were devised, had an interest in it to that extent at least. Their portions were paid by *William Wiley*, the husband of *Susanna*, who was the purchaser at the sheriff's sale, and who thus became the assignee of their interest, which was afterwards regularly vested in the defendant below. He

(a) 1 *Vern.* 411.(c) *Barn. Rep. in Ch.* 86.(b) 2 *Vern.* 163.

1818. was, therefore, entitled to hold the land, until he was paid the amount of two-thirds of its value, with interest. The judgment, however, turns him out altogether, and is therefore erroneous.

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With respect to estoppel, there is not perhaps enough on the record to give the plaintiff in error, full advantage of that point; but it may be contended, that *Caleb Wiley*, who purchased the estate as a fee from his father's executors, and afterwards suffered it to be sold as a fee, is estopped from denying that it was so. 10 *Vin.* 456. pl. 8. sect. 12, 13, 16. 18. *Id.* 463, pl. 24. *Id.* 477. pl. 8. *Id.* 483. pl. 7. *Jackson v. Hinman.*(a)

*Edwards and Tilghman*, for the defendant in error.

The only question properly brought up by the record is, whether or not *Susanna Prew* took an estate tail, and that she did is perfectly clear. The argument, that she took an estate in fee with an executory devise over, is ingenious but fallacious. Wherever a contingency is limited to depend on an estate of freehold, which will support a remainder, it shall never be construed an executory devise, which, next to an estoppel, is odious in law, because it tends to create a perpetuity. *Note to Purefoy v. Rogers.*(b) The language of the will of *Caleb Prew* is very strong, and clearly points out his intention. He had four daughters, and intended that his lands should descend in the line of the two eldest; and that the two youngest should be provided for in money. On the event of the land given to one, crossing into the line of the other, he orders a new valuation in favour of *Sarah and Mary*, to make their provision in money, equal to that of their sisters in land, and declares, that the inheritances shall descend to the lawful heirs from generation to generation. Where an absolute fee simple is given by express words, and the devise is restrained by the words, "and if he die without issue of his body," or by words of a similar import, it is an estate tail; still more is it so, where a fee simple, created by implication of law only, as was the case here, is restrained by such words. To *Betty*, he gives an estate tail in positive, technical terms, and afterwards directs the estates of *Susanna and Betty* to go over on the same event, that is, on the failure

(a) 10 *Johns.* 292.

(b) 2 *Saund.* 393.

of issue in either, to the next elder. By the words *next elder*, 1818. he did not mean the eldest at the time of the happening of *Philadelphia*. the event, but the eldest at the time the will was made. *Susanna* and *Betty* were the eldest daughters; therefore, upon the death of one, the other must have been the next elder. These words have the same signification, as the words, *the other*. They, therefore, took estates tail with cross-remainders. Nor was the estate of *Susanna* enlarged by the supposed charge in favour of *Sarah* and *Mary*; for although, where an estate is given in general words of devise, charged with a gross sum, it is a fee, yet where the estate is specified, no such implication arises. 4 *Bac. Ab.* 256. 258. 2 *Bac. Ab.* 543. 2 *Bl. Com.* 114, 115. *Co. Litt.* 9, b. 27, a. *Leigh v. Brace.*(a) *Pells v. Brown.*(b) *Gardner v. Sheldon.*(c) *King v. Rumball.*(d) *Dyer*, 171. *Anonymous.*(e) *Co. Litt.* 21, a. *Paramour v. Yardley.*(f) *Canon's case.*(g) *Holmes v. Meynel.*(h) *Wilson v. Dyson.*(i) *Chadock v. Cowley.*(j) *Nottingham v. Jennings.*(k) *Doe v. Holmes.*(l) *Morgan v. Griffiths.*(m) *Denn v. Shenton.*(n) *Lessee of Haines v. Witmer.*(o) 2 *Bl. Com.* 301. *Law v. Davis.*(p) *Hawley v. Northampton.*(q)

Taking it for granted, that an estate tail was given to *Susanna*, the next question is, whether or not it was barred either in law or equity. That it was barred by fine, recovery, or any of the usual modes of barring estates tail, is not pretended; but it is supposed, that the same effect was produced, by the sale under the execution in the suit brought by *Sarah* and *Mary Prew*. No facts can be known to this Court, but those contained in the opinion of the Court below, and to these, they must strictly confine themselves. It was the duty of the plaintiff in error, to bring up the case in such a manner, as to present fully to the view of the superior Court, every point on which he desired their opinion. This he has failed to do, and he cannot now introduce any matters not to be

(a) *Curth.* 343. 5 *Med.* 266.(b) *Cro. Jac.* 590.(c) *Faugh.* 273.(d) *Cro. Jac.* 448.(e) 4 *Leon*, 14.(f) *Plowd.* 541.(g) 3 *Leon*, 5.(h) *Sir T. Ray.* 463. *T. Jones*, 173.(i) *Sir T. Ray.* 498.(j) *Oro. Jac.* 605.(k) 1 *Ld. Raym.* 508.(l) 3 *Wills.* 244.(m) *Comp.* 234.(n) *Comp.* 410.(o) 2 *Yeates*, 400.(p) 2 *Str.* 850.(q) 3 *Mass. Rep.* 44.

1818. found in the record. *Downing v. Baldwin.*(a) *Burd v. Philadelphia. Dansdale.*(b) In the action brought to *May Term, 1745*, no declaration was filed; it was therefore impossible to know, for what cause the action was brought. The record merely shews, that there was a suit between certain parties, and nothing more. It does not appear, that the parties to that suit were the same persons who were mentioned in the will of *Caleb Prew*; or that the premises sold, were the same which were devised; or that they were sold to raise the portions of his younger daughters; or that they were sold in fee; or that the defendant below, claimed under the purchase at sheriff's sale. None of these facts appear upon the record; and therefore, if the words of the devise created a fee tail, the only question really in controversy, as the case stands before this Court, the judgment ought to be affirmed of course. The argument, in the Court below, went upon the ground, not that the suit in 1745, was brought to raise the portions of *Sarah* and *Mary*, but, that it was for the recovery of a debt, due from *Caleb Prew*, the testator; and that it was not brought for the legacy, is inferible from its having been, not an action on the case for two thirds of the value of the land, but an action of debt for a specific sum. It is denied too, that *Caleb Prew* intended to charge the place devised to *Susanna*, with the portions of *Sarah* and *Mary*. Arguments drawn from English books, have no application here. In *England*, lands are not liable for debts, for which reason, courts of equity, wherever they can discover an intention in the testator to charge his real estate, incline strongly towards giving operation to the charge; but in *Pennsylvania*, where lands are assets for the payment of debts, the same reason does not exist. There must however, even in *England*, be a plain intention to charge the land. 4 *Vin.* 458. *D.* pl. 2. *Id.* 461. pl. 16. *Id.* 462. pl. 18. 2 *Eq. Ab.* 499. pl. 24. *Id.* 500. pl. 27. 31. *Id.* 503. pl. 41. The cases cited by Mr. *Binney*, prove this. In all of them, the estates were expressly charged, or it was plainly the intent of the testator, that the real estate should be resorted to. Nothing of this kind, appears in the will of *Caleb Prew*. The words of the devise, do not create an express charge. They are altogether personal. He gives the place on which he resided, to *Susanna*, "she paying two thirds of the value thereof, to her

(a) 1 *Serg. & Rawle*, 298.(b) 2 *Binn.* 92.

two sisters," &c., not "she paying *thereout*." Nor does he use any language which connects the payment with the land. The money might have been paid, for aught that appears, out of another fund. A moiety of the real estate, was undisposed of, during the widow's life; during that period, it descended to the four daughters; and this would afford a fund, out of which *Susanna* might have paid the portions of her younger sisters. Whether or not there was any other fund, than the land itself; and whether the money had been actually paid, were facts which ought to have been submitted to the jury. But if the devise did create a charge, it was a charge on such an estate as the devisee took, namely, an estate tail, and such an estate only, was sold by the sheriff, because, he could convey to the purchaser, no greater estate than the defendant possessed. What estate he undertook to sell, the record does not shew, but the presumption is, that he sold only an estate tail, since he was authorised by law, to sell no more. The purchaser was, in all probability, aware of the nature of the estate he was about to buy, and paid less in proportion. There is a great difference, between the sale now under consideration, and a sale under a decree of a court of chancery, for the purpose of raising money to pay debts, legacies, or portions. Equity would not lend its aid to bar the issue in tail. Every party in interest, would have been called in, and an opportunity would have been afforded to the issue in tail, to pay off the incumbrance. If a sale were ordered, it would not extend beyond two thirds, or if the whole of the land were sold, the surplus beyond the charge, would have been tied up, for the benefit of the issue in tail. *Fox v. Crane*.(a) None of these things could be done by a court of law, and if the sheriff's deed conveyed a fee simple, the interests of the issue in tail, were wholly unprotected.

On the subject of estoppel, little need be said. It is quite clear, that nothing was done by the plaintiff below, by which he was estopped. The estate which he purchased of his father's executors, was only the estate which his father had during his mother's life, and was no part of that to which he was entitled, as heir in tail. Besides, the Court below, were not called upon to pronounce an opinion on the point, whether or not *Caleb Wiley* was barred by his own acts; and this Court cannot reverse a judgment, for errors in an opinion never delivered.

(a) 2 Vern. 304.

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1818. *TILGHMAN C. J. Caleb Wiley*, the plaintiff below, claimed as heir of the body of *Susanna*, the daughter and devisee of *Caleb Prew*, who was seised in fee of the land in dispute in this ejectment. The first question is, what estate was given to *Susanna*, by her father's will, which was expressed in the following terms.

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[The Chief Justice then read that part of the will, on which the question turned.]

Without doubt, *Susanna* took an estate tail; for although in the immediate devise to her, there is no limitation to the heirs of her body, and the charging her with the payment of two thirds of the value, would seem to indicate an intention of giving her the land in fee, yet the intention to give no more than an estate tail, is to be clearly inferred, from the subsequent expressions; for after giving an express estate tail, to his daughter *Betty*, the testator adds, *and if either of my said children should die without issue, then the inheritance, to descend to the next elder.* Now this shews, that he meant both the preceding devises to be of the same nature, so that *Betty's* being an estate tail, so likewise must *Susanna's* be. But this is not all; for the testator, determined to remove every shadow of doubt, with respect to his intention, proceeds to declare it to be his will, *that all his land shall descend to the lawful heirs, from generation to generation*, which could no otherwise be effected, than by estates tail given to each of the devisees.

The plaintiff being the heir of *Susanna* in tail, would be entitled to recover, then, unless something has occurred to destroy the entail. No fine or common recovery has been suffered; but the defendant contends, that the entail was broken by virtue of a judgment and execution, in an action brought in the year 1745, by *Sarah* and *Mary Prew*, against *Susanna*, and her husband *William Wiley*, for the recovery of two-thirds of the value, with which the land devised to *Susanna*, was charged. It is a very ancient transaction, and it seems that the record of this judgment is not complete. No declaration is to be found, but it appears to have been an action of debt, for 250*l.*, brought against *William Wiley*, and *Susanna* his wife, "late *Susanna Prew*, daughter and devisee, in the last will and testament of *Caleb Prew*, deceased." There can be no doubt, but this action was brought for the recovery of the money charged on the land devised

to *Susanna*, and payable to her sisters, because it never has been the practice in this State, to bring suits against an heir or devisee, for debts due from the testator. In such cases, the action is brought against the executor, and on a judgment against him, an execution issues, which may be levied on any lands of the testator, whether they be held by the heirs or devisees. The question will be then, whether, in case of a legacy charged on land, an action will lie against the devisee, or terre-tenant, and the legacy be recovered by a sale of the land. If we had a court of chancery, the remedy of the legatee would be found there. In *Clawdsley v. Pelham*, 1 *Vern.* 411, lands were devised *in tail*, with an order, that the devisee should pay the testator's debts. The Court decreed the land to be sold for the payment of debts. And in *Wareham, &c. v. Brown, &c.*, 2 *Vern.* 153, the land was decreed to be sold, where it had been devised *in tail*, charged with the payment of *debts and legacies*. In *England*, where the remedy in chancery is easy, we are not to expect many cases, in which this point has been agitated, in the Courts of common law. Perhaps it may be considered as doubtful, whether, there, an action for the recovery of a legacy charged on land, be at this day sustainable in a court of common law, although HOLT Ch. J., is reported to have affirmed that it is, in the case of *Ewer v. Jones*, (2 *Ld. Raym.* 937. *Salk.* 415. 6 *Mod.* 26.) I say it may be considered as doubtful, because notwithstanding the great authority of Ld. Ch. J. HOLT, no record has been produced of any such judgment in *England*, since the time of the Commonwealth. But it appears from the case of *Nicholson v. Sherman*, in the 13th year of *Charles II.*, reported in 1 *Sid.* 45, and *T. Raym.* 23, that during the time of the Commonwealth, the courts of common law sustained actions for the recovery of legacies, *from necessity*, because the ecclesiastical courts were abolished, and chancery had not then assumed jurisdiction in cases of legacies. Now the same necessity exists at the present moment in this Commonwealth, and therefore, the Courts should assume the same jurisdiction. I speak now of legacies not within the provision of our act of assembly; legacies, charged upon land, and not payable out of the personal estate. But, it has been said, that there is no necessity for this kind of action, because the legatee may support an ejectment for the land, out of which the legacy is payable. If he

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1818. may, it must be also from necessity, because the land is not devised to him, either directly or indirectly. And if we are to have recourse to some action from necessity, it will be best to adopt that, which is best suited to the nature of the case. What we are in want of, is a mode for raising a sum of money out of land. This may be done by an action, demanding the money, and not the land; by virtue of which, the land may be sold. But this cannot be done by ejectment. For what is the legatee to do, after he has recovered possession of the land in an ejectment? He has no title to the fee; he has no right to sell; he only holds the land, as security for the legacy. Is he to keep an account of the profits, and hold, only until he receives satisfaction for the legacy and interest? This is, involving him in a most inconvenient transaction, and not answering the intention of the testator, which was, that the legatee should have the money, and not the land. This difficulty seems to have struck the minds of the counsel who brought the action for *Sarah and Mary Prew*, so long ago, as the year 1745, and to surmount it, they brought an action, by virtue of which the *fee simple* might be sold. It would have answered no purpose for the sheriff to expose to sale, the estate tail which was vested in *Susanna Wiley*. All the right which she had, would have expired at her death, and then, the issue in tail would have entered. No purchaser would have offered more, than if he had been bidding for an estate during the life of *Susanna Wiley*. The President of the Court of Common Pleas, in delivering his opinion to the jury, has taken for granted, that the judgment affected only the estate tail, and if it were so, the conclusion which he has drawn, is undoubtedly correct. But it appears to me, that he was mistaken in his premises, because the judgment was to be satisfied, not out of the estate of *Susanna Wiley*, the devisee, but out of the estate of her father, the testator, who gave her the estate tail, charged with the legacies to her sisters. We have had occasion to consider this matter, in the case of *Brown, &c. (in error.) v. Furer, &c.* (a) decided at *Lancaster*, the last *May Term*; and although the point was not absolutely decided, yet the Court strongly intimated its opinion, that, where a legacy was charged on land, the legatee might support an action against the executor, and terre-tenant, the judgment in which, might be exe-

(a) *Ante.* 213.

outed on the land, without affecting the persons of the defendants. In the argument of that case, a precedent was cited, of an action brought by a legatee against the executor, and terre-tenant, in the case of *Patterson v. M'Causley's executors, &c.*, in the Court of Common Pleas of Lancaster county, and the declaration was said to have been drawn by Mr. Burd, the late prothonotary of this Court. It would seem proper, that the executor should be made a party to the suit, or at least should have notice, with liberty to appear and plead that the real estate of the testator, was not more than sufficient to satisfy his debts; because, the whole real estate being assets for the payment of debts, it was not in the testator's power to exempt it from that payment; and if there was no surplus, the legacies would fall. Whether the action of *Prew v. Wiley and wife*, was brought in the proper form, is not now the question. If the judgment was erroneous, the issue in tail might have reversed it, on a writ of error; but even if reversed, the sale of the land by the sheriff, under which the defendant claims, would have stood firm.

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The public interest demands, that there should be some certain remedy for the recovery of legacies charged on land. This necessity has long been felt, and I am of opinion, that the courts of law have it in their power to give relief, and that relief was actually given, in the action of *Sarah and Mary Prew v. William Wiley and wife*. By virtue of the judgment in that action, the estate of the testator was sold, to satisfy the legacies given to his daughters; and consequently, the estate tail, devised to *Susanna Wiley*, was destroyed, and an indefeasible estate in fee, passed by the sheriff's deed, to the purchaser. I am therefore of opinion, that judgment should be reversed, and a *venire facias de novo* awarded.

GIBSON J. Were it clear the testator intended to give *Susanna* a fee, I think the limitation over might be supported as an executory devise; for being to the next elder of persons then in existence, it would clearly indicate that the failure of issue contemplated was to take place, if at all, in the life-time of at least one of those persons. I admit also, where a general failure is not contemplated, but an estate is limited to go over on failure of issue of the first devisee,

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within a period not too remote for an executory devise, that the mentioning of this particular kind of failure, alone, will not be taken as a limitation of an estate tail, by implication, to the first devisee, but as a designation of a contingency, on the happening of which the limitation over is to take effect, without regard to the quality of the estate in the first devisee. If, therefore, the matter stood on this particular case, I should suppose *Susanna* (without entering into the question, whether she took for life or in fee,) did not take an estate tail. But other expressions convince me the testator intended she should take in tail; and if that be clear, any words denoting such intention will be sufficient. Indisputably his object was, to keep his estate in his family. He had two plantations and four daughters. One plantation equal in value, it may be supposed, to her proper share, he devises to *Betty* in tail, by express and technical words. To *Susanna*, he devises the other plantation, equal in value to the shares of the other three, charged to the amount of two-thirds of its value in favour of *Sarah* and *Mary*. He then provides, that if either of his children should *die without issue*, the inheritance should go to the *next elder*, she dividing the value among the survivors or their heirs; and then comes an emphatical declaration of intention; "*all my said lands to descend to the lawful heirs, from generation to generation.*" From his evident aversion from dividing his *land* among his children, (keeping it in *statu quo*, and giving to two of them a compensation in money,) and his decisively expressed meaning, that the land should descend to the lawful heirs from generation to generation, it is clear his general and paramount intent was, to render his estate inalienable, as far as the law would permit; and that intent we are bound to execute, by moulding the different estates, so as to give it effect, even at the expense of any particular minor intent that might happen to be inconsistent with it. Now if we suppose a fee in *Susanna*, with an executory devise over, it is clear, if she or her issue had survived the person designated as the next elder of her sisters, or at least if she had survived them all, the devise over would have been gone, and the estate being absolute in *Susanna*, might instantly have passed from the family by alienation. It is, therefore, immaterial, whether the omitting words of intailment in the devise to *Susanna* were accidental or not; it is evident the testator could not have meant the es-

tate should go over, in the event of her dying without issue in the life-time, only, of the next eldest sister, but on a general failure of *Susanna's* issue, whenever it might happen. It is of no consideration, that, giving *Susanna* an estate tail, she might have suffered a recovery, and consequently, by this construction, the intention was equally liable to be defeated. That was a liability, arising *dehors the provisions of the will*, and against which the law did not permit the testator to guard. As far as depended on the acts of the testator himself, the giving a fee tail to his children was the method most likely to confine, indefinitely, the descent to their issue. And besides, it is not perfectly clear, that before the act of 1750, common recoveries had any definite, legal, existence in *Pennsylvania*, and the testator died before that period. From the whole of this will, taken together, I am clear it was not in fact the intention, that the land in dispute should go over in no other event than *Susanna's* dying without issue, living her elder sister; it was to go over on a general failure. If so she took a fee tail, and the limitation to the next elder, is good by way of remainder. It is worthy of remark, also, that the land devised to *Betty*, (to whom an estate tail is expressly given,) is to go over on the same contingency as regards her, the same clause embracing both devises; and clearly as to *Betty*, a general failure was intended. This, therefore, plainly indicates the kind of failure contemplated as to *Susanna*. It would be strange, if the same clause should receive one construction, when applied to one devisee, and a different one when applied to another. It is indeed held, that as regards real and personal estate, this clause of dying without issue, may be differently construed when applied to the one and to the other species of property, the personalty being more favoured in this respect, on account of the interest of the heir being out of the way, and also, because goods are not the subject of intailment. *Forth v. Chapman*, 1 P. Wms. 663. But the clause is taken in two different senses, only where the intent will be best answered by so understanding it. *Richards v. Lady Bergavenny*, 2 Vern. 324. Here the reason does not hold, as the interest of the heir is not concerned on either hand, the limitation over being at all events good, either as a remainder or an executory devise, and the intent is best promoted by understanding the words in the same sense when applied to each devisee;

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1818. and to this I may add, there is no case where a difference  
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An argument is raised, from *Susanna* having taken the land charged with two-thirds of its value, and it is inferred, she must have taken a fee to prevent her from being a loser by the devise. In all the cases on this subject the question was between an estate for life and a fee; here it is between fee tail and fee simple. I cannot say there is any thing in this charge of two-thirds of the fee simple value, as I understand it, that would, independent of other circumstances indicating the quantity of her interest, carry the estate of *Susanna* beyond the term of her own life. The devise was not on condition of paying the sum charged; and the legacy is barely charged on the estate devised, without any personal charge on *Susanna* in respect of such estate in her hands. Where there is no personal charge on the devisee, a charge on the estate will not enlarge his interest by implication. *Cruise Dig. tit. Dev. ch. 11. sect. 59.* But in all the cases of this class, the condition of paying a sum of money, the charging the land with payment of debts or legacies, or the apparent necessity of a fee to enable the devisee to perform a duty enjoined on him, are all circumstances from which, in default of express words of limitation, an intention to give an estate of inheritance may be presumed, and in such case, if nothing else appear, the law will presume the largest estate was intended. The whole, however, is a question of intention, and if it appear, that more than an estate for life, and less than a fee, was intended, why should such intention not prevail? An estate for life or in tail, created by express words, may be charged with payment of money, without the charge having the effect of enlarging the estate, and there can be no difference whether the intent be denoted by express words, or implied from circumstances sufficiently clear; in this case the intention to give *Susanna* a fee tail is manifest.

But whether the estate tail of *Susanna* was barred by the sale under the judgment against her and her husband, is a question about which I feel great difficulty, and I therefore express an opinion on it with unfeigned diffidence. The length of time that has intervened since the sale, the hardship of the case as to purchasers, and all equitable consid-

rations, I lay entirely out of the question. The issue in tail stands on a legal title, and is not calling on a court of chancery to interfere in his behalf. And would chancery decree an injunction in favour of a purchaser of a fee tail, at a sale not pursuant to any mode by which, according to law, the interest of the issue could be divested, even though the purchase money had been applied to the extinguishment of a charge on the estate, and so far operated beneficially for the issue? If the Court had not jurisdiction in the form of action resorted to for compelling payment of the legacy charged, and could not raise the money out of the land by a sale, the purchaser paid his money at his peril, and cannot charge the land with any equity against the issue. There might, however, be acts done by the issue, inducing the purchaser to buy, which would amount to a positive fraud on his part and would affect him personally, but nothing of the kind appears in the case we have before us, nor does it appear the Court below was called on to pronounce an opinion on the consequence of such acts, if they did exist; and I cannot consent to reverse a judgment, for error in an opinion never delivered. The naked question then is, would such a sale, at this day, be good to divest the estate of the issue in tail? For if his legal title be not completely barred he must prevail. A legacy can only be sued for in chancery; for although the courts of common law for a short period did, from necessity, entertain actions for legacies, yet the practice ceased with the necessity that gave rise to it; it was not that they would not, but, that they could not take cognisance of such cases; after the appropriate tribunal was open, the practice ceased. The act of assembly giving jurisdiction to our common law courts, does not embrace a case like the present, where a devisee and not the executor, is the person to be called on for payment. It must be admitted the action is a novelty; but I would not object on that ground, if it were calculated to effect the object with the least possible inconvenience, and at the same time secure those interests that on such an occasion would be the first care of a court of chancery. Not having that court, we are frequently obliged to turn our limited means to the best account, by sustaining actions in our courts of common law, that would never be thought of where the benefits of a court of equity are enjoyed. In *England* the remedy in a case like the present, would be in

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1818. chancery ; (for the stat. 3 W. and M. c. 14, provides an action  
*Philadelphia* for a very different case,) and I grant chancery would exting-  
 uish the estate of *Susanna* by decreeing a sale of the fee.  
 Given But then no more would be sold than would be absolutely  
 & necessary to raise the sum required ; the residue must be  
 Warrant. left for the issue. *Randall v. Bosley*, 2 Vern. 425. But if to  
 prevent deterioration from a division, it were found neces-  
 sary to sell the whole, the surplus after paying off the incum-  
 brance would be considered as real estate. *Maughan v. Ma-  
 son*, 1 Ves. & Bea. 416. Possibly if the tenant in tail were  
 not a *feme covert*, payment might be decreed directly to such  
 tenant, because having power to suffer a common recovery  
 and turn even entailed property into money, it would be a  
 useless precaution to order the surplus to be invested in land  
 under the same limitations as the estate sold. But in the  
 case of a *feme covert* the case would be widely different, and  
 chancery would never permit the husband to lay his hands  
 on any part of the proceeds of his wife's real estate. Here,  
 where we cannot insist on an adequate settlement, even in  
 the case of personal property the evil would be much great-  
 er. We ought, therefore, to protect the *feme covert* tenant  
 in tail, and as far as we can the issue from the rapacity of the  
 husband and father, who from an improper use of his con-  
 trol, may prevent his wife from exonerating the estate, that  
 he may get possession of the wreck of it. We should pre-  
 vent too a valuable estate from being put under the hammer  
 to discharge an incumbrance of perhaps the fiftieth part of its  
 value. By a personal action none of these objects can be  
 attained ; the whole is sold, if the rents and profits will not  
 pay the charge in seven years, which if the land be not im-  
 proved, is a matter past being hoped for ; the issue is disin-  
 herited, and the husband gets possession of his wife's inter-  
 est without settling a farthing on her and her children.

In *Pennsylvania*, the action of ejectment has been resorted  
 to as a means of compelling payment of money charged on  
 land, where there was no common law remedy. This form  
 in a case like the present, would be found as efficacious as a  
 personal action, and attended with fewer inconveniences.  
 Where the land is the fund for payment, and the owner will  
 not raise the requisite sum, it seems more reasonable and  
 more analogous to the practice of chancery, whose decree in  
 such case is specifically *in rem*, to proceed against the fund ex-

clusively, and deliver it to the creditor subject to be redeemed by payment of principal and interest. I can see nothing incongruous in this; because there being no personal liability, the fund alone is debtor, and the creditor must be considered as having an interest in the *land itself*. Why may not that interest support an ejectment as well as an equitable lien, which was deemed sufficient in *Irvine v. Campbell*, 6 Binn. 118. This mode would have this great advantage, that the nature of the property would not be changed by the process, and when the estate should be redeemed, the former interests would still exist. The objection to this, is, that money being the object of the legatee, land in lieu of it, would not answer his purpose, especially if it were unimproved. I grant its force. But it is to be remembered, that only a court of chancery can do effectual justice, and that every form of proceeding we may devise, will be defective: the inquiry is, what is least so? A fear of losing possession would stimulate the owner of the land to exertion in raising the money; but even should the legatee be driven to an ejectment, he might, in most cases, raise the sum due by a sale, after recovery, subject to the right of redemption, as no doubt purchasers on such terms might be found. In fact, previous to the act of 1705, giving a *scire facias* to a mortgagee, he had no remedy but an ejectment, for recovery of the mortgage money, and then the same inconvenience was suffered; yet it was a considerable time before the legislature interposed, and I never heard, that at any time previous to the act, an action of debt on a mortgage was sustained.

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In the case of *Brown v. Furer*, the Chief Justice inclined to the opinion, that a personal action might be sustained; but that was not the point decided. The single question was, granting the action lay, whether proper persons were parties on the record. I cannot say, whether this question formed a part of the argument, as I was not present. I should most probably have concurred even if I had heard the argument; for the circumstances of the case were not calculated to present to the mind the inconveniences resulting from a personal action. According to my recollection the interest of a *feme covert*, or issue in tail, was not involved. Under these circumstances I assented to the opinion delivered.

Although I incline to give the ejectment a preference over a personal action, yet it is necessary some mode should be

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*Philadelphia.* recovered, and therefore, notwithstanding, I am for affirm-  
 GAUSE ing the judgment, I shall acquiesce in considering the deci-  
 v. sion of this case as settling the law.  
 WILEY.

There is no force in the argument, that the plaintiff below is estopped, by having purchased land from the executors of *Wiley*, who was the purchaser at sheriff's sale. The plaintiff purchased merely what the sheriff had a right to sell; that is, the life estate of the tenant in tail, at that time an existing interest. Although the Court may not have had jurisdiction over the subject matter, in the form of action resorted to, still the judgment was not void, but irregular, and like a judgment in an action of debt for any other cause, being entered generally, it bound only that interest which the defendant had in the land. This consideration, also, would prevent the operation of the statute of limitations, if that point had not been abandoned on the argument here.

DUNCAN J. The words of the will of *Caleb Prew*, and state of facts which gave rise to the present controversy, are these.

[Here his honour stated the devise.]

*Susanna*, intermarried with *William Wiley*, some time before *May Term*, 1745, and before that time they must have entered and taken possession; for to that Term, an action of debt was brought, by *Sarah and Mary*, against *William Wiley*, and *Susanna*, his wife, late *Susanna Prew*, daughter and devisee, in the last will and testament of *Caleb Prew*, deceased. The declaration is lost, but the inference made by the Court was the most reasonable one; that it was for the charge on the land devised to *Susanna*, and brought against them as devisees, and terre-tenants. A judgment was obtained, and a sale by the sheriff to *William Wiley*, and his heirs and assigns for ever; a deed was made and duly acknowledged. *William Wiley* devised these lands to his executors, to be sold, who made a sale to *Caleb Wiley*, and executed to him a conveyance, as of the fee simple estate. *Caleb Wiley* then came into possession, and continued in possession, and on judgment obtained against him in 1789, the lands were sold by the sheriff, and conveyed in due form to *Joshua Bailey*, and his heirs and assigns for ever. Possession has been held under this sale until the present ejectment was brought,

before the commencement of which, in 1814, *Susanna Prew* 1818. died, leaving the present plaintiff, her eldest son and heir at *Philadelphia,* law. The Court instructed the jury, that the law was with the plaintiff, and he was entitled to recover.

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Our first enquiry is, what estate did *Susanna* take, in fee simple, or in tail? The devise to the widow, of one moiety during life, and the charge of two thirds of the value thereof, to *Sarah* and *Mary*, if there was a defect of expression as to the nature of the estate devised, would form conclusive evidence of an intention to devise in fee; for every devise imports a benefit intended, which in this instance never could be, if *Susanna* took in tail; (for the power of barring issue in tail, never enters into the mind of a testator;) but here is a technical devise in tail; “*if any one of my said children die without issue, the inheritance to descend to the next eldest, and their lawful heirs, from generation to generation.*” It is impossible to disregard the operation of these words, which have a plain and obvious meaning, inconsistent with an estate, absolute and unlimited. *Susanna* took as tenant in tail; and if the case rested on the construction of the will alone, the plaintiff would be entitled to recover; but on the state of facts, other questions of some difficulty arise, new in some degree, but in investigating which, we are not left without analogous principles.

Our inquiries are: 1st, As to the nature of the estate, acquired by *William Wiley*, on the sale to him. Did he acquire an estate in fee, or in tail, or were the proceedings of 1745, a mere nullity, leaving him in *statu quo*, tenant by the curtesy? For if those proceedings were erroneous, they are not now before this Court, on writ of error to reverse them. Indirectly, and not directly they are; and if they were, and this Court should be of opinion they are erroneous, this would not restore the land to the plaintiff.

2d, If *William Wiley* did not take a legal fee simple, is *Caleb Wiley*, the issue in tail, barred by limitation?

3d, Does his conduct furnish such a distinct ground of equity, that chancery would interpose by injunction, and prevent his recovery?

What was the nature of these conditional fees before the statute *de donis*? He that had a fee conditional, or qualified, had as ample and great an estate, as he that had a fee simple absolute. *Co. Lit.* 18; and that statute only rendered it inalienable by tenant in tail, preserved it from for-

1818. *Philadelphia*. seiture for treason, beyond the life of the tenant in tail, and exempted it from payment of his debts; but it did not make it less an estate of inheritance, or change the quality in which the issue succeeded to the title; for the succession to fee simple, and to fee tail, are both equally considered as titles by legal succession, that is, by descent; the difference being only, that the inheritance in fee simple, existed before the statute, and the inheritance in tail was a modification of the former. *Harg. Law Tr.* 572. It fortified the hereditary title, and led it along, and protected it on its passage in the path prescribed by the donor. Here *Caleb Wiley* takes, as heir to his mother, the donee, as the stock designated by the gift, exactly as he would have done, before the statute *de donis* took away the power of alienation, after issue born. But it did not affect the estate of the donor in any other respect. The radical error, on which the opinion of the Court is founded is, in considering with respect to this charge, the estate tail in the ancestor, and the interest of the issue, as separate and distinct interests; whereas, in truth, for this purpose they form but one estate. By the statute, the estate is divided into two parts, leaving in the donee, a particular kind of estate, denominated an estate tail, and vesting in the donor, an ultimate fee simple of the land, expectant on the failure of issue, which expectant estate takes effect as a remainder or reversion; and in considering the action of 1745, as a personal action against *Susanna*, for a personal duty, whereas, it is against the fund; she being the only person representing that fund, who could be brought into Court. The judgment against the land, including the remainder expectant on the failure of issue; the charge, a general charge on the land, and not on the particular estate of any individual, the judgment must consequently be commensurate with the charge, and the charge considered as part of the land; for where a sum of money is given originally and primarily out of land, a will with that charge, must be executed with the solemnity required in devises of land, because such charge is considered in equity, as part of the land, since it can only be raised by a sale, or disposition of part of the land; and this is analogous to the rule of law, that a devise of the rents and profits, is a devise of land itself. *Brudenell v. Boughton*, 2 Atk. 268. Why is it, that the sale of *Caleb Wiley's* estate did not pass his interest

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as issue in tail? Because, as was properly determined, he took by descent from *Susanna*. The sale on any judgment obtained for a charge by a testator, must be a sale of the absolute estate, and the issue be bound by such sale, unless by the will itself the charge is made a special one, on some special interest devised; for the issue take according to the will of the donor, which is the only rule and guide of descent in tail; and it was part of that will, that the money should be raised out of the estate. There is no foundation in the objection, that the issue in tail are not parties, for the ancestor represents them. They might aver, that the sale was made by covin, or bring a writ of error, to reverse the ancestor's fine or recovery affecting the estate, by reason of the privy of blood and estate. *Dyer*, 90. This therefore never can be considered as a sale of any particular interest of *Susanna*, for so was not the charge. Two-thirds of the value of the place never could be raised by a sale of *Susanna's* life estate; two-thirds of the value of the fee simple; for that is the true construction, and the meaning put by the testator, on the word value, in another part of the clause; "dividing the value among the survivors, or their lawful heirs;" thus considering the value of the land, as the land itself. We have heard much of the sanctity of the rule as to general intention. This supposed general intention has often destroyed all intention, general and particular of the testator. It is said here, it was to preserve his estate in his family, from generation to generation; but if any clear intention is discoverable, it is this, to put his daughters in equality. To *Susanna* the favourite, the mansion place, she paying *Sarah* and *Mary* two-thirds of its value; not the value of two-thirds of any particular estate devised to *Susanna*, but two-thirds of the whole inheritance; for if her particular interest considered as something distinct from the inheritance, was only the subject of the charge, *Susanna* is disinherited, and *Sarah* and *Mary* do not get that which their father intended; for who at that day, who now, would give two-thirds of the value of a fee simple, for a life estate in the whole, even in houses, much less in lands? The testator intended, and that is the construction of law, that the charge should be satisfied by a sale. How else could *Susanna* raise it? The personal estate is devised wholly to the mother, for a power to sell is perfectly consistent with an estate tail. When any

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1818. matter is granted, there it is implied that the grantee shall enjoy it; and the law in such grant must afford the means of enjoyment. There cannot be two judgments, one against *Susanna* and her life estate sold, and on her death, another against the issue in tail, and so on from generation to generation, until the whole was raised. Nor was it the intention of the testator, that *Sarah* and *Mary* should wait *Susanna's* death, much less the death of unborn generations *ad infinitum*, before they could force a payment of their whole legacies. There is very high authority to support the doctrine, that in *England*, on the statute of wills, a legacy arising out of lands, was recoverable in the common law courts, by action of debt against the devisee and terre-tenants. *Twisden*, (Sir *T. Raym.* 24,) says it was so decided in the King's Bench; and *HOLT*, in *Ewer v. Jones*, 1 *Salk.* 415. 2 *Ld. Raym.* 937, clearly held the law to be so. The remedy is now in chancery, because chancery can afford the most adequate relief; and it is for this reason, we find so little on this subject in the common law reports, and not that the action is not supportable at common law. In *Atkins v. Hill, Cowp.* 287, it is observed, that the discovery and relief given in a court of equity, is so preferable a remedy, that it has drawn thither all suitors, and therefore in fact, there is scarcely an instance, of a legatee attempting to sue at law. In *New York, Livingston v. Livingston's executors*, 3 *Johns.* 189, the charge is considered, not as a personal duty which would descend on the personal representatives of such devisee, but that the heirs of such devisee, are chargeable at law, as terre-tenants, and owners of the land. At a very early period in *Pennsylvania*, the action of debt, against the heirs and terre-tenants, was adopted as the remedy for the recovery of such charge; and the matter was most maturely considered by the Chief Justice of this Court, in the case of *Brown v. Furer*, in which his opinion was delivered the last session at *Lancaster*, that a charge on land by a testator, is not personal on the devisee; that the land is the fund to be looked to, in whatever hands it may be; and that in *Pennsylvania*, from necessity, there being no court of chancery, the remedy must be by this action, and he rather inclines to think the devisees, terre-tenants, and executors, are the proper parties, and that this form of action was in use in early times, and the judgment is to be entered, so as to charge the land, and not the person of the devisee.

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This charge operates as a judgment, and sheriffs, in the sale of lands, are bound to take notice of it; for where lands charged with a legacy are sold as the estate of the devisor, the legatee was let in as a judgment creditor to receive out of the purchase money the amount of his legacy. *Nichols v. Posthlewate*, 2 Dall. 131. By the substitution of the action of debt in *Pennsylvania* for the bill in chancery, so far as the courts of chancery could grant relief by bill in compelling a sale, this action of debt will produce the same effect here. If a legacy is charged on land, the land itself shall be sold. 2 Str. 38. What then is the course in chancery?

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On a devise of a certain sum to be paid out of the receipts and profits of land, if the profits will not raise a sufficient sum within a reasonable time, a sale of the land itself will be decreed. *Heycock v. Heycock*, 1 Vern. 256. *Berry v. Askham*, 2 Vern. 26. and *Jackson v. Farrand*, Id. 424. In *Partidge v. Pawlet*, 1 Atk. 467, the rule as to payment of interest on a legacy charged on land is, that the tenant for life pays one-third; the reversioner two-thirds. When the principal came to be paid, the same rule would hold. But the decisions go all the length of this case. *Sadd v. Carter*, Prec. in Ch. 27. A devise of lands to A, for life, remainder to such child or children as should be living at the death of the survivor, and to their heirs equally to be divided, A paying 40*l.* to B; this is a charge, not only on A's life estate, but on the remainder. The Court decreed the land to be sold for the payment of the money, and of the overplus of such sale, defendant to have such part of it as was answerable to his life estate. It is to be observed, that the only parties to this bill were the legatees on the one hand, and the devisees for life on the other, and yet the Court decreed a sale of the whole estate. If it was only a charge on the estate for life, if the first taker died the day after the testator, the charge would die with him. But suppose the devisee dies before the testator, the charge shall remain as charged in the hands of the heir; and this has been determined in *Wigg v. Wigg*, 1 Atk. 382. A, devised his lands to his son Thomas, on condition that he shall pay his children 90*l.* with clause of distress and re-entry. Thomas died in the testator's life-time; the son of the eldest son of the testator entered on the land as heir, and sold; the charge is a continuing one on the land, and the chancellor permitted

1818. the legatees to bring in a bill to have the lands sold. It is true, he observes, that if there had been no clause of re-entry the legatee had no lien on the land, but the heir should enter for the condition broken; but he is considered in equity as a trustee for the legatee. Nothing can more strongly prove, that the charge has no dependance on any particular estate devised, for it must be raised, though the particular estate to which the condition of payment is annexed never came into existence. Lands devised to the heir paying, is no condition, but will raise a trust. *2 Freem. 278. pl. 248.* Devise of lands to a stranger paying, &c. is a condition,—but in case of an heir, it is not; but the heir enters for condition broken and recovers in ejectment. Being a charge expressly created on the land, it will bind the land in his hands after recovery in ejectment. *Hodge v. Raison, 1 Ves. 47.* But in *Pennsylvania*, a devise to the eldest son and heir at law, paying the other children, it is the law, that such son would not be considered as the heir where lands descend equally, and therefore the legatee may enter as for a condition broken. *Ruston v. Ruston, 2 Teates, 54.* An ejectment could have been supported by *Sarah and Mary*, and if the condition went to the heir at law, he would take in trust for them, and they might bring an ejectment in their own names. If, in 1745, they had brought an ejectment, recovered, taken possession and enjoyed it for 70 years without an offer to redeem by payment of the legacy, it would be difficult to support the position, that the issue in tail could now have disturbed that possession. If a court of chancery would have decreed a sale, and if the parties had had recourse to the only adequate remedy, and accomplished a sale by the substitution of this action against the devisees and terre-tenants, when it is considered, that this, from early times, has been the usual legal remedy by proceeding *in rem*, as in debt, and that the judgment is a judgment *de terris*, it appears to me, that the whole estate of *Caleb Prew*, by virtue of these proceedings, became vested in *William Wiley*; at least, that it was a binding sale of the whole interest of *Susanna Prew* and her issue, claiming by descent, *per formam doni*.

The sale to *William Wiley*, and his acceptance of a conveyance from the sheriff in fee, does not amount to a discontinuance, and therefore give him a defeasible fee. For in *1 Smith, 205*, and *1 Teates, 389*, it is decided, that a purchaser at sheriff's

sale of the estate of a tenant in tail may suffer a common recovery, and bar the issue in tail, by vouching the tenant in tail. This could not be, if such sale was a discontinuance; for by a discontinuance the ancient legal estate tail, which ought to have survived to the heir at law, is at least suspended, and for a while discontinued. Nor could the act of the husband alone operate as a discontinuance, either by acceptance of a conveyance in fee, or by himself conveying a fee; for though by the common law the alienation of the husband alone, who was seised in right of his wife, worked a discontinuance of her estate, yet now by stat. 32 H. 8. c. 28, it is provided, that no act of the husband shall work a discontinuance of, or prejudice the inheritance or freehold of the wife, but that after his death, she or her heirs may enter on the land. *Runn. on Eject.* 42. 45. I hesitated for some time, whether equity would have decreed more than a sale of two-thirds, or whether *Sarah* and *Mary* could have supported their ejectment for more than two-thirds; but in another view of this case it becomes unnecessary to give any opinion how that would be; for if more were sold than equity would direct, and a possession under that sale for more than twenty-one years, the limitation act gives to such possession a positive right. But admitting the proceedings to be a nullity, for want of jurisdiction of the cause, or of proper parties to the suit, the possession of *Caleb Wiley*, certainly that of *Joshua Bailey*, was adverse to *Susanna*. *Bailey* purchased it as the fee simple estate of *Caleb Wiley*; claiming the fee simple he came into possession; he made expensive improvements, which he would not have made as a mere tenant during the life of *Susanna*, then an old woman. The fact of the adverse possession at least, should have been left to the jury, for this is a question of fact sometimes involving the motives and intentions of a party, which it is the province of a jury to decide. *Cummings v. Wyman*, 10 Mass. 468.

The possession of one tenant in common is the possession of all. It is not adverse to his co-tenant, but a sale and uninterrupted possession for more than 30 years, by one tenant in common, without any act done, or complaint made, or claim set up by his companion, has been held a sufficient ground for a jury to presume an actual ouster of the other. Nor does it require the possession to have been originally adverse; for a man may come in by a rightful possession, and yet hold on

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1818. adversely without title. As if a tenant *pur autre vie*, hold over for 20 years after the death of *cestui qui vie*, such holding over will be a complete bar to the remainder-man or reversioner, because it is adverse to his title. *Fisher v. Prosser*, Cowp. 217.

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The judgment in 1745, was a condemnation of the fee simple to satisfy the charge, for no court of law or equity could direct a sale of *Susanna's* interest only; and what is conclusive, is this:—that if *Susanna's* interest had not sold for a sufficient sum to discharge the whole lien, they could have no proceedings against the issue in tail, when their right came into possession; the demand could not be split into different causes of action, affording different legal remedies against several parties, as their respective interests became vested in possession. It is, therefore, manifest, that if *William Wiley* did not acquire the fee simple, he did not acquire any estate, and that he remained tenant by the curtesy, and *Susanna* tenant in tail, the estate tail never discontinued, and that on his death *Susanna* had a right of entry; and if *Susanna* did not enter for twenty-one years, the adverse possession would bar her issue in tail. This is clearly established, and I shall barely refer to *Martindale's Lessee v. Troop*, 3 Harr. & M'Hen. 244, in the General Court and Court of Appeals of *Maryland*. The principle there decided was this:—that the issue in tail, whose ancestor having a right of entry by force of the entail, loses that right by adverse possession, for the period prescribed by the statute of limitations, is in virtue of that possession barred of his entry on succeeding to the same land.

It remains to consider this case on the last head of inquiry. Does the plaintiff stand in that situation, that a court of chancery would restrain his recovery by injunction? If he does, he never can recover in ejectment in *Pennsylvania*; for if the plaintiff in ejectment is in equity bound to make a title to the defendant, for part of the premises, the Court will stay execution, until that title is secured. 2 Binn. 93.

Acts of bare acquiescence of the issue in tail, could not have the effect of postponement; but where such issue have been active in the sale, and have received the whole benefit, much more so where they are parties to it, chancery will interpose, not by or on account of legal but of equitable estoppel. *Caleb Wiley* bought from the executors of his father's will,

not an estate tail, but an estate to him, and his heirs and assigns, for ever. On that title he acquired the possession. This estate, and this possession, are sold for the payment of his debts; they are paid by the purchase money, without any notice to the purchaser. This sale would be considered in equity as made by him, and the purchase money paid over to his use; and would it be endured in equity, that he should disturb the possession, and hold the land discharged of the payment of his debts? This forms, in my opinion, a distinct ground for equitable relief; for if issue in tail in possession, claiming the fee, sell during the life of his ancestor, chancery would interpose, and prevent his recovery; nay more, they would decree that such issue should suffer a recovery, for the use of the grantee, as is stated in *Powell v. Powell, Prec. in Ch.* 279. So in *Raw v. Potts, ib.* 35, where *A*, being tenant in tail, remainder to *B*, *A*, not knowing of the remainder, made a settlement on his wife, by way of jointure, which *B*, who knew of the estate, engrossed, and after the death of *A*, recovered in ejectment, against the widow; she was relieved, by perpetual injunction. So in a similar case, *Hunsden v. Cheyney, 2 Vern.* 150, where a mother, the absolute owner of a term, (the same being settled on her in law,) having been present at a treaty for her son's marriage, and having heard him declare, that the term was to come to him, on his mother's death, and attested the deed whereby the reversion of the term was settled on the issue of the marriage after her death, she was compelled to make good the settlement. Here, all things conspire to hold out to the world, that *Caleb Wiley* was in possession, claiming under his father's will, and not by descent from his mother. He suffering, silently, the estate to be sold as his own in fee, the money to be appropriated to pay his debts, shall his attempt to take advantage of this mistake, by which he received so great a benefit, be attended with success? I suppose both parties to be equally innocent; shall he now say, I did not know of this, but it is a most lucky hit, and I will avail myself of it, and having received the value of the land, I will now recover the land itself? This would be against every principle of equity, for there is a positive fraud in attempting to profit by the mistakes of another, which are the consequences of our own misrepresentations, or of the false expectations raised in his mind, by our illusory behaviour; and

1818.

*Philadelphia.*GAUSE  
v.  
WILEY.

1818. there is a negative fraud, in imposing a false appearance on another by silence, where silence is treacherously expressive. *Philadelphia*. In equity, therefore, where a man is silent, when in conscience he ought to have spoken, he shall be debarred from speaking, when conscience requires him to be silent. And the protecting jurisdiction of chancery has stretched itself to those cases, where the illusory hope has been raised, not by words, but simply by looking, or by silence, while false impressions which we are either able to correct or verify, are inducing a fruitless expenditure. *Roberts Fraud. Conv.* 130. 133. Thus if I persuade another to act, upon a confidence that I can make him a grant, or give him an interest, which, at the time of the promise, is out of my power, and afterwards, by an unforeseen accident I am enabled to do the thing promised, equity will compel the performance. *Id.* 135. The rule is general, that to take advantage of a mistake where one has the opportunity or means of putting it right, is a fraud in equity. *Id.* 524. 530.

GAUM  
v.  
WILEY.

Now here, the plaintiff acted fraudulently, by his treacherous silence, by which he was a gainer, or he acted by mistake, which he has now the means and opportunity of setting right, by conveying that estate, the value of which he has received, and under all the extraordinary circumstances of the case, chancery would compel him to set right. I do not say, this would be the effect of a sale by the sheriff, of the interest of the issue in tail, but rest on the issue in tail claiming the fee simple on a judicial sale of the fee simple, and coming into possession under that right. My mind has been led by this course of reasoning, to the following conclusions:

1st. That *Susanna* took under her father's will, an estate tail.

2d. That by the proceedings by *Sarah* and *Mary*, against *Susanna*, and her husband, authorised by that will, the fee simple vested in *William Wiley*.

3d. That if the fee simple did not vest in *William Wiley*, the estate tail of *Susanna* did not, nor was it, discontinued, nor *William Wiley* gain a defeasible fee, but remained tenant by the curtesy; and consequently *Caleb Wiley*, under the conveyance from his father's executors, acquired no title, but that his possession was wrongful, and adverse to *Susanna*, and that *Bailey* having come in under that possession, and

*Susanna* not having entered within 21 years after her right of entry accrued, her issue in tail are barred, and, 1818.

*Philadelphia.*

GAUSE

v.

WILBY.

4th. That in every view of the case, the plaintiff is not entitled to recover, but that he stands postponed in equity; not concluded by legal estoppel, but by an estoppel in equity, arising from his acts and silence, which render it against all conscience that he should recover.

Judgment reversed, and a *venire facias de novo* awarded.

## The Commonwealth against The Commissioners of the County of Philadelphia.

48R 541  
378C 7

Saturday,  
December 19.

C. S. COXE, on behalf of the attorney-general of *Pennsylvania*, obtained a rule to shew cause, why a *mandamus* should not issue to the commissioners of the county of *Philadelphia*, commanding them to draw an order on the county treasurer for certain fees claimed by him in three cases, which are stated in the opinion of the Court.

If the grand jury return a bill "*ignoramus*," in a case other than felony, and order the prosecutor to pay the costs, and the prosecutor having been sentenced by the Court to pay them, is committed and then discharged according to law, without having paid them, the county is not liable to costs.

*Delany*, for the commissioners.

The opinion of the Court was delivered by

TILGHMAN C. J. The attorney-general demands from the commissioners of *Philadelphia* county, payment of his fees in three cases herein-after stated, and the question is, whether the county be bound to pay them.

Nor is the county liable, if a bill be found "a true bill," and the defendant having been tried and acquitted, and ordered by the petit jury to pay the costs, is

1st. If the grand jury return a bill "*Ignoramus*," in a case other than felony, and order the prosecutor to pay the costs, and the prosecutor having been sentenced by the Court to pay the costs, is committed, and then discharged according to law, the costs not being paid, is the county liable to costs?  
2d. If a bill be found "A true bill," and the defendant having been tried and acquitted, and ordered by the petit jury

sentenced by the Court to pay them, and is committed and discharged according to law, the costs not being paid.

Nor if the defendant is acquitted, and the prosecutor ordered by the petit jury to pay the costs, who, after being sentenced by the Court to pay them, is committed and discharged according to law, the costs being unpaid.

1818. to pay the costs, is sentenced by the Court to pay them, committed, and discharged according to law, the costs not being paid, is the county liable?
- The Commonwealth v. The Commissioners of Philadelphia county.* 3d. If the defendant is acquitted, and the prosecutor ordered by the petit jury to pay the costs, who, after being sentenced by the Court to pay them, is committed and discharged according to law, the costs not being paid, is the county liable?

There is no necessity for going further back than "the Act to regulate the payment of costs on Indictments," which became a law without the Governor's signature, on the 7th December, 1804; because that act, so far as concerns the present questions, operated as a repeal of all former laws. The preamble recites the inconveniences which had arisen from the county's paying the costs of prosecution, in all criminal cases where the accused are acquitted, and the 1st section enacts, that in all prosecutions, cases of felony only excepted, if the bill shall be returned "*Ignoramus*," the grand jury shall decide whether the county or the prosecutor shall pay the costs; and in all cases of acquittal on indictments for the offences aforesaid, the jury trying the same shall determine by their verdict, whether the prosecutor, or the county, or the defendant, shall pay the costs; and it is provided by the 2d section of the same act, that when the jury shall determine that the prosecutor shall pay the costs, the Court shall forthwith pass sentence to that effect, and order him to be committed till the costs are paid, unless he gives security to pay the same within ten days. So far as the three cases before stated depend on this act of assembly, it is clear that the county is not liable to costs, because it was the main object of the act, to prevent the burthening of the county with costs in cases where the grand, or petit jury, ordered the prosecutor or the defendant to pay them. But it is contended, that the costs fall on the county by virtue of the 13th section of the fee bill, which was passed the 28th March, 1814. The words are as follows:—"In case of a conviction in any Court of Oyer and Terminer, Quarter Sessions, or Mayor's Court, all costs shall be paid by the party convicted; but when such party shall have been discharged according to law, without payment of costs, the same shall be paid by the county." The case turns upon the meaning of the word *conviction*. The attorney-general contends, that a prosecu-

tor, who is adjudged to pay costs by the grand jury, and a defendant who is acquitted, but adjudged to pay costs by the petit jury, are *convicted* within the meaning of the fee bill. I am of a different opinion. A person is not *convicted*, unless he is *found guilty*. That is the sense in which the word is usually taken, and it would be wrong to strain it, in order to throw costs upon the county. I am of opinion, that in neither of the three cases stated, is the county bound to pay costs.

1818.

Philadelphia.

The Commonwealth

v. The Commissioners of Philadelphia county.

Rule discharged.

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MOLLET *against* FONSECA.

## FOREIGN ATTACHMENT.

Saturday,  
December 19.

RULE to shew cause of action, and why the attachment should not be dissolved.

The Court dissolved a foreign attachment, because the plaintiff's affidavit stated, that the defendant, in consideration that the plaintiff would forbear to sue him for six months, promised to pay; without averring that he did forbear.

*Meredith*, for the plaintiff, produced the affidavit of *John Le Mesurier Smith*, of *Madeira*, agent of the plaintiff, who swore, that the defendant was indebted to the plaintiff, in the sum of 2111*l.* 5*s.* 1*d.*, sterling, and upwards; that the late *George C. Smith*, being at the time of his death, indebted to the plaintiff, and the defendant having married his widow, and taken upon him the administration, &c., the plaintiff's account was stated and exhibited to him, and by him examined, adjusted, and acknowledged to be correct; in which account there was a balance due to the plaintiff, of 2111*l.* 5*s.* 1*d.*, sterling, which the defendant, in consideration of the plaintiff's forbearing to press the payment thereof for six months from the 14th *February*, 1817, promised to pay to the plaintiff, after the said six months, with interest at five per cent.

The action was against the defendant *personally*, and not as administrator. To shew that a forbearance of suit against an executor, is a good consideration to charge him personally without assets, and that assets are a sufficient con-

1818. sideration to charge an executor *de bonis propriis* on his own  
*Philadelphia.* promise, Mr. *Meredith* cited, 3 *Bac. Ab.* 90. *Executor and*  
 MOLLET *Administrator, Cro. Jac.* 47. 9 *Co.* 94. *Baines' case. Roll. Ab.*  
 v. 921. 2 *Leo.* 3. *Vent.* 120. 5 *Binn.* 33. 36. *Tol. on Exr's.* 363.  
 FOWNERA. *Cro. Eliz.* 91. 1 *Veaz.* 125, 126. *Cowp.* 289. 293. 1 *Sid.* 89.  
 1 *Lev.* 71. 1 *Roll. Rep.* 27. 1 *Saund.* 210. note 1. 211. note 2.  
 2 *Saund.* 136, 137. *C.* note 2. 1 *Com. Dig.* 96. *Cro. Eliz.*  
 455. 665. 703. 758. 804. 4 *Dall.* 226. 2 *Binn.* 509. 2 *Johns.*  
 243. 4 *Johns.* 237.

He contended also, that the same strictness was not necessary in an affidavit, on which to ground an attachment, that was required in an affidavit to hold to bail; for which he cited, 1 *Dall.* 154. 158. 160.

*Binney*, for the defendant, conceded that it was not necessary to allege assets in the declaration, and that a promise, in consideration of forbearance, is *prima facie* evidence of assets; but denied, that without assets, such a promise would bind an executor. There must be benefit on one side, or injury on the other, to give effect to a promise. Forbearance, where originally there was no cause of action, forms no consideration for a promise. The responsibility of an executor is commensurate only with assets. A promise therefore by an executor, without assets, to pay in consideration of forbearance, is *nudum pactum*, because, there was originally no cause of action against him. A married woman gives her note as sole, and after the death of her husband, in consideration of forbearance of suit, promises to pay. This, is *nudum pactum*, *Lloyd v. Lea.*(a) A husband, after the death of his wife, who was executrix of *A*, promises payment of a debt of *A*, in consideration of forbearance of suit; held to be *nudum pactum*, because he was not liable to an action, after his wife's death, *Smith v. Johns.*(b)

But the affidavit itself is defective. It states, that the defendant, in consideration of the plaintiff's forbearing to press him, promised; but it is not said, that the plaintiff *did* forbear. For aught that appears, he may have brought a suit. There is no reason why an affidavit in a foreign attachment should not be as strict as one to procure bail.

(a) 1 *Str.* 94.

(b) *Cro. Jac.* 257.

PER CURIAM. The affidavit is not sufficient. It states 1818.  
no cause of action. The defendant's promise to pay was in *Philadelphia*.  
consideration, that the plaintiff would forbear for six months,  
and it is not averred, that he did forbear. *MOLLET*  
*v.*  
*FORSER.*

Attachment dissolved.

### PLUMSTEAD'S APPEAL.

*Saturday,*  
December 19.

481545  
190 409

THIS was an appeal by *Mary, Clementina, Margaret,* R, G, died  
and *William Plumstead,* by their guardian *Thomas Lowry,* leaving to sur-  
from the decree of the Register's Court of the county of a daughter of  
*Philadelphia,* in which the following case was stated for the T, P, deceased  
opinion of this Court. ed, a brother  
of R, G, of the  
whole blood,  
and a nephew  
and several  
nieces, the  
children of G,  
P, a brother of  
R, G, of the  
half blood. In  
her life-time  
R, G, inclosed  
in a paper  
which she  
placed in a  
mahogany  
box, several  
bonds, and a  
certificate of  
bank stock,  
which were so  
found by the  
administrator  
after her  
death, with  
the words,  
"For R, H,"  
written on the  
envelope, in  
R, G's own  
hand-  
writing, which  
was proved by  
two witnesses.  
She also in-  
closed in her  
life-time, in

"*Rebecca Gore* died about the 1st July, 1809, leaving to  
survive her *Rebecca Hutton,* daughter of *Thomas Plumstead*  
deceased, the brother of *Rebecca Gore* of the whole blood;  
and *Mary, Clementina, Margaret,* and *William Plumstead,*  
children of *George Plumstead,* the brother of *Rebecca Gore*  
of the half blood.

"In the life-time of *Mrs. Gore,* she enclosed in a paper,  
which she put into a mahogany box, the following bonds and  
certificate, which were so found by the administrator after  
her decease, with the words "*For Rebecca Hutton,*" written  
on the envelope in *Mrs. Gore's* own hand-writing, proved  
by two witnesses, viz. *William Cramond* and *Henry Nixon.*

"Bond, *John Nixon* to *Rebecca Gore,* for - 400l.

" do. to do. - - 600

" *Joseph Swift* to do. - - 100

" *Henry Drinker* to do. - - 300

" *Richard Stevens* to do. - - 300

"Certificate of one share of stock of the Bank of Penn-  
sylvania.

another paper which was so found by the administrator after her decease, several other bonds,  
among which was one from G, P, to R, G, on which there was a testamentary indorsement, in  
favour of her nephew, the son of G, P, dated five years before her death. On the envelope of the  
last mentioned bonds, the words "*For the heirs of G, P,*" were written in the hand-writing of  
R, G, which was also proved by two witnesses. The papers so directed and indorsed, remain-  
ed in the possession of R, G, during her life, without her having made any delivery of them in  
a ny form, or having communicated the circumstance to any one. Held, that the papers so in-  
dorsed could not be admitted to probate, as a will in writing of R, G.



1818. "In like manner, Mrs. Gore in her life-time enclosed in another paper the following bonds, which were so found by the administrator after her decease, with the words, "For the heirs of George Plumstead," written on the envelope, in Mrs. Gore's own hand-writing, proved by the same witnesses, viz.

Philadelphia.  
PLUMSTEAD'S  
Appeal.

4 SR 545  
219 648

"Bond, Joseph Swift to Mary Plumstead, 600*l*.

" George Plumstead to Rebecca Gore, - 200  
with a testamentary indorsement in favour of William Plumstead, a minor, dated June, 1805, on the bond.

"Same to the same, - - 9*l*. yearly.

"The papers so enclosed and indorsed, remained in the possession of Mrs. Gore during her life, without her having made any delivery of them in any form, or having communicated the circumstance to any of the parties interested, or to any other person; and it is not known, at what time, or for what purpose, the said enclosures and indorsements were made, otherwise, than as appears from the papers and indorsements themselves.

"The estate of George Plumstead was insolvent at the time of his death, which was years before the death of Mrs. Gore.

"The question for the opinion of the Court is, whether the indorsements on the said envelopes are such, as that they can by law be admitted to probate, as a will in writing of Rebecca Gore."

*Rawle, jun. and S. Levy*, in support of the decree of the Register's Court, cited *Roberts on Wills*, 196. 4 *Bac. Ab.* 339. *Legacies, B. God. Orph. Leg.* 282. *Stone v. Evans.*(a) *Hight v. Wilson.*(b) *Lewis v. Maris.*(c) *Englefried v. Woel-part.*(d) *Ruston v. Ruston.*(e) *Swinb.* 6, 7, 9, 10. *Fisher v. Nicholls.*(f) *Molineux v. Molineux.*(g) 8 *Vin.* 44. *Havard v. Davis.*(h).

*Kittera and Tilghman*, against the decree, cited 8 *Vin.* 44. *A. 2. Disher v. Disher.*(i) *Taggart v. Toner.*(j) 7 *Bac. Ab.* 307, 8. *Roberts on Wills*, 196 to 201.

(a) 2 *Atk.* 86.

(b) 1 *Dall.* 94.

(c) 1 *Dall.* 286.

(d) 1 *Yeates*, 45.

(e) 2 *Yeates*, 60.

(f) 3 *Salk.* 394.

(g) *Cro. Jac.* 144.

(h) 2 *Binn.* 406.

(i) 1 *P. Wms.* 204.

(j) 5 *Binn.* 496.

The opinion of the Court was delivered by

1818.

DUNCAN J. The question is, can an envelope inclosing securities for debts, with this indorsement, *For Rebecca Gore*, and another envelope inclosing other securities indorsed, *For the heirs of George Plumstead*, in the hand-writing of the deceased, never having been out of her possession, and without any communication made to any one on the subject, or any evidence to shew at what time, or for what purpose the indorsements were made, be received and probate granted of them as testamentary papers? Without going through the variety of cases which have been cited, each depending on its own particular circumstances, the Court deem it sufficient to declare, that the indorsements are not in their nature testamentary, *per se*. There is nothing in them marking an intention to dispose of the security by those indorsements, as by will; nor any declaration of the intention of the deceased, that these securities after her death should go to the person mentioned in the inventory; nor do they contain the slightest evidence of legatory words, nor in any way denote a legatory donation. If the envelope inclosed a patent to *Rebecca Gore* for a tract of land, with the indorsement *For the heirs of George Plumstead*, this never could be considered as a devise of land. I cannot distinguish the cases. It might be the intention of *Rebecca Gore* to dispose of these securities by will, or give them in her life-time to the persons mentioned; but the naked word, "*For*," never could amount to a testament, which is defined to be the legal declaration of a person's intention which he wills to be performed after his death.

*Philadelphia.*  
*PLUMSTEAD'S*  
*Appeal.*

Decree reversed.

1818.

Philadelphia.**ELDRIDGE against ROBINSON.***Thursday,*  
December 24.**FOREIGN ATTACHMENT.**

On a rule to shew cause of action, this Court will not receive supplementary affidavits.

A RULE having been obtained on a former day to shew cause why the attachment should not be dissolved, the plaintiff made an affidavit which was not deemed sufficient, and now *Broom*, on his behalf, asked leave to exhibit a supplementary affidavit, and mentioned several cases in which they had been received, particularly the case of *Fisher v. Consequa*, in the Circuit Court of the *United States*, for the *Pennsylvania* district.

*Binney*, contra, answered, that in cases of this kind, an appeal was made to the conscience of the plaintiff, who swears to all that he can in conscience swear to. Courts, therefore, refuse to hold to bail, unless there is a positive affidavit of a real subsisting debt. It must be such an affidavit as would, if false, subject the party who swears, to an indictment for perjury. If supplementary affidavits were permitted, an unprincipled man would never suffer a defendant to escape. He would learn how far it was necessary for him to go and swear to the mark. The reason why they are rejected is, that after the point has been mooted, they are not a fair test of the conscience of the party. Where there is merely an informal authentication, or where there are literal errors, these defects may be amended; but a want of substance cannot be cured. In *England* they are received in the Common Pleas, but not in the King's Bench.

The opinion of the Court was delivered by

**TILGHMAN C. J.** The plaintiff in this cause having made an affidavit which was insufficient, now offers a supplemental affidavit. That is against the practice of this Court, and therefore cannot be admitted. In this respect, we follow the practice of the Court of King's Bench, because we think it better adapted to produce certainty, and avoid the temptation to perjury, than the practice of the Common Pleas, by which supplemental affidavits are admitted. There are in-

stances in which such affidavits have been received, and the case of *Sims v. Hampton* is one of them. But in that case there was no objection on the part of the defendant; and if the other cases were investigated, it is presumed, that they would be found to have been received on the same principle. There are special reasons why this Court should not relax its practice. All the Judges are frequently absent from the city, engaged in Courts held at a great distance. Advantage has often been taken of this circumstance, to hold defendants to excessive bail. It is but reasonable, therefore, that the plaintiff, when cited, should at once make out a sufficient cause. The circumstance of this case being a foreign attachment, in which the goods are detained, without touching the body, we do not think a sufficient cause for a difference of practice. A detention of goods may not be so grievous, as imprisonment of the body, but there are cases in which it may do great injury, and even be ruinous to the defendant. It is the opinion of the Court, therefore, that the supplemental affidavit should not be received.

1818.

*Philadelphia.*

ELDRIDGE  
v.  
ROBINSON.

Attachment dissolved.

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**/ PARK against GRAHAM, Trustee of KENNEDY  
an Insolvent Debtor.**

IN ERROR.

*Monday,*  
*December 28.*

FROM the bill of exceptions which was returned with the record of this case from the District Court for the city and county of *Philadelphia*, it appeared, that *William Graham*, the plaintiff below, and a certain *Henry Remson*, were appointed by the Court of Common Pleas of *Philadelphia* county, trustees of the estate of *James Kennedy*, an insolvent debtor, who petitioned for a discharge under the act of 26th *March*, 1814. In consequence of this appointment, *Kennedy* conveyed all his estate to the said trustees, by deed dated the 16th *October*, 1815. Before the commencement of this suit, *Graham* gave bond, according to the directions of the 3d section of the act of assembly, for the faithful execution of

If the Court appoint more than one trustee under the 3d section of the act of the 26th *March*, 1814; and only one give bond agreeably to the 3d section, he cannot exercise the duties of his trust, and consequently, an action brought by him alone, cannot be maintained.

1818. his trust ; but no such bond was given by *Remson* the other trustee.  
*Philadelphia.*

**PARK**  
 v.  
**GRAHAM**  
 trustee of  
**KENNEDY**,  
 an insolvent  
 debtor.

On the trial of the cause, the defendant contended before the District Court, that upon this evidence, the plaintiff could not support his action ; and prayed the Court to direct the jury accordingly. But the Court were of opinion that the action was maintainable, to which the counsel for the defendant excepted.

*P. A. Browne and Rawle*, for the plaintiff in error.

*Shoemaker*, contra.

The opinion of the Court was delivered by

**TILGHMAN C. J.** The act of 26th March, 1814, under which the insolvent debtor *James Kennedy*, was discharged, directs the Court to appoint "such trustee or trustees of the debtor, as two-thirds in number and value of his creditors then attending, either in person, or by attorney, shall nominate ; or if the said creditors should not attend, or not nominate any trustee, the Court shall appoint such trustee or trustees as they may think proper."—By the 3d section of the act, it is provided, "that every trustee, before he acts as such, shall give bond for the faithful execution of his trust, and in case of the refusal, or delay of any trustee or trustees to act, or in case of his or their death, the Court may appoint another or others, in his or their room," &c. And by the 4th sect., "the trustee or trustee, shall be deemed vested with all the estate of such debtor, at the time of his or their appointment," &c. Whether it was necessary for *Kennedy* to execute an assignment to his trustees, we do not decide ; because, even if the estate became vested in the trustees by the appointment of the Court, it would be impossible for one trustee to support an action, when no authority was given to him but in conjunction with another. If the creditor neglect to nominate, the power of appointment devolves on the Court, who, if they think proper, may appoint but one trustee ; but having appointed *two*, one has no power to act. As the present case was circumstanced, then, *Remson* having delayed to qualify himself for acting, by giving security, and consequently having no power to act, the Court might have

appointed another person in his place. As soon as the person so appointed had given security, as required by law, he, together with the plaintiff, might have supported an action. But when this suit was brought, there was no person in existence, who had a right of acting, because there was none to whom the sole power of collecting the debts of *Kennedy*, had been entrusted.

There was another bill of exceptions taken by the counsel for the defendant, on which we give no opinion, because none is required of us. If it were asked by the counsel on either side, we would give it. It is the opinion of the Court, that the first exception was well taken, and therefore, the judgment should be reversed.

Judgment reversed.

### CUTBUSH *against* GILBERT.

IN ERROR.

*Monday,*  
December 28.

UPON a writ of error to the Court of Common Pleas of *Philadelphia* county, the case appeared to be this :

*James Cutbush*, the plaintiff in error, brought an action against *John Gilbert*, the defendant in error, before alderman *Badger*, to recover the sum of ninety dollars, for eighteen weeks board of the defendant's wife. On the 16th *February*, 1816, the plaintiff obtained a judgment for the sum demanded. From this judgment the defendant appealed, and on the 6th *January*, 1817, the case was tried in the Court of Common Pleas. The plaintiff proved, that the wife of the defendant, had boarded at his house eighteen weeks, and that the sum of five dollars per week, was a reasonable charge. The defendant then gave in evidence, the following notice, published in *Poulson's* paper of the 27th *September*, 1815.

Evidence is not to be considered secondary unless it carries with it an indication that better remains behind.

Receipts by third persons are not evidence to prove payments.

The persons who gave the receipts should be produced.

If, after the plaintiff has closed his evidence, without having made out such a case as will entitle him to recover, the defendant gives testi-

mony, the plaintiff may give evidence to rebut that of the defendant, although by doing so, he supplies the defects of his case as originally proved.

1818.

## "PUBLIC CAUTION.

*Philadelphia.*CUTBURN  
v.  
GILBERT.

"Whereas several debts have been contracted on my account, without my knowledge, by different persons in this city; this is to caution the public, against trusting any person or persons on my account, without a written order from me for the same, as I am determined not to pay any debts or demands of that nature.

(Signed)

"John Gilbert."

"Philadelphia, 27th September."

This notice the plaintiff admitted he had seen. The defendant proved further, that a few days after his wife went to board with the plaintiff, he called on him, and asked him how he expected to be paid for the board of his wife; to which the plaintiff replied, that if the defendant would not pay him, he must look to the defendant's wife. Upon this, the defendant said he would pay his wife nothing but her monthly allowance. To shew that he and his wife lived separate and apart, and that he allowed her a separate maintenance, which was punctually paid, the defendant offered certain receipts, which were objected to by the counsel for the plaintiff, but admitted by the Court. The counsel for the plaintiff, to rebut the evidence given by the defendant, offered to prove that the defendant had deserted his wife, and had neglected to maintain her in a manner suitable to his degree. To this evidence, the counsel for the defendant objected, and the Court refused to receive it.

*Barclay and Browne*, for the plaintiff in error.

1. To entitle a man to claim an exemption from the payment of his wife's debts for necessaries, on the ground of separation, it is necessary that he should prove, that they were separated by a binding valid agreement, made with a person able to contract; that the separation was intended to be permanent, not dependent on the arbitrary will of the husband; that the allowance was suitable to her degree, and that it has been regularly paid. The allowance agreed on, is not conclusive as to the amount the wife is to receive, unless the husband's circumstances continue the same. If his fortune increase or decrease, her allowance must be greater or smaller in proportion, and the jury must form an opinion according to his situation at the time the alleged necessaries were furnished. The only evidence offered by the defend-

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ant to establish these facts, was the receipts, which, although it is admitted they were signed by the persons whose names they bear, prove nothing. They do not prove a separation, for she might have received an allowance, in the nature of pin money, while living with her husband. If they afford even a presumption, that the husband and wife lived apart, they do not shew that they did so, by virtue of an agreement binding in law. A man cannot enter into an agreement directly with his wife. 1 *Bl. Com.* 442. *Co. Litt.* 112. a. It was incumbent therefore on the defendant, to shew a contract entered into on behalf of his wife, by a third person, who was competent to contract; and certainly the receipts do not afford the smallest inference of this. If they shew any thing, they shew a contract by a husband immediately with his wife, which is void in law. It is not contended, that the separation must be by deed, but the agreement must be of such a nature, as will secure to the wife a proper maintenance. Besides, the receipts were not the best evidence the nature of the case afforded. The agreement which must have existed if the separation was valid, ought in the first instance to have been produced. And admitting that the persons who signed the receipts were the agents of the wife, of which there was no evidence, they amount to nothing more, than declarations not under oath, of third persons who might have been sworn as witnesses. *Baker v. Barney.*(a) *Lockwood v. Thomas.*(b) *Thompson v. Hervey.*(c)

2. The receipts having been received in evidence, it was error to refuse to permit the plaintiff to rebut them, by shewing a state of things, inconsistent with what they were supposed to prove. It is the duty of a husband not only to maintain his wife, but to maintain her in a manner correspondent with his condition in life. If an inference were to be drawn from the receipts as to the degree of the husband, the plaintiff had a right to shew by way of rebutter, what his degree actually was. And as the defendant had given evidence of a notice not to trust his wife, it was competent to the plaintiff to shew, that he had deserted her, and was therefore bound to pay for the necessaries furnished to her in her distress, notwithstanding the notice; for by the desertion he gave her a letter of credit upon the world. 1 *Bac. Ab.* 488.

(a) 8 *Johns.* 79.(c) 4 *Burr.* 2177.(b) 12 *Johns.* 243.



1818. (Wils. edit.) *Bolton v. Prentice.*(a) *Robenson v. Grenholt.*(b)  
*Philadelphia. M. Gahay v. Williams.*(c)

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*Wilcocks and C. J. Ingersoll*, for the defendant in error.

The question is, not whether a man is bound to maintain his wife, but as to the propriety of the decision of the Court of Common Pleas, in receiving and rejecting evidence. The defence was, that *Gilbert* and his wife were separated by consent, and the only question below, was, and is in this Court, on the first point, whether the receipts were competent to go to the jury. Their effect was another thing which the jury were to determine, and with which the Court had nothing to do. A man is bound to provide his wife with necessaries, but necessaries do not embrace board and lodging out of his own house. With respect to these, husband and wife are identified; and his obligation only extends to furnishing her with meat, clothing, &c., in his own house. If she wishes to purchase necessaries, and he forbids a tradesman to sell them to her, he is not answerable. *Todd v. Stokes.*(d) If however, they consent to live asunder, the husband is not liable even for necessaries, provided he furnishes her with the means of supplying herself. It is not necessary that there should be a deed, to render the separation valid; it may be proved by other evidence; and as reputation is sufficient to prove a marriage, so reputation is also sufficient to prove a temporary suspension of marriage. The evidence given in this case, tended to prove a separation. The defendant therefore, was not liable, unless it appeared that he had turned her out of doors, which the plaintiff ought to have shewn in the first instance. So far from this having been proved, however, the receipts shew that she was furnished with an allowance which was punctually paid, and according to the case already cited of *Baker v. Barney*, that is sufficient to exempt the husband from responsibility. The plaintiff too, was not warned by the common reputation only of the defendant's separation from his wife, not to trust her; he had seen the notice in the public papers, and he had been personally informed by her husband, that he would pay nothing for her beyond her allowance. This was going further than the husband was bound to do, in order to exonerate himself from

(a) 2 Str. 1214.

(b) 1 Salk. 119.

(c) 12 Johns. 293.

(d) 1 Ld. Raym. 444.

liability; for if he merely proved a general reputation that he was separated, without shewing that it had come to the knowledge of the plaintiff, it would have been sufficient. It is the duty of a person who supplies a married woman separated from her husband, with necessaries, to enquire into her situation. If he fails to do so, he trusts her at his peril. *M<sup>c</sup>Cutchen v. M<sup>c</sup>Gahay.*(a) *Cragg v. Bowman.*(b) 1818. *Philadelphia.*

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v.  
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The evidence offered by the plaintiff, was not with a view to rebut the evidence given of separation and maintenance, but as proof of the inadequacy of the allowance, and of the desertion of the husband. The idea of inadequacy is incompatible with desertion; for if the husband made any provision for his wife, he did not desert her. Whether that provision was adequate or not, was a matter between the parties and their friends, with which creditors had no concern. The only means by which they can recover from the husband, are by shewing, either that there was no separate maintenance, or that it was not regularly paid. In the present instance, the evidence proved a separate maintenance regularly paid, as to the amount of which the wife was concluded by her agreement. This agreement having been proved by evidence which the jury thought sufficient, evidence of previous quarrels, or of previous desertions, was irrelevant.

The opinion of the Court was delivered by

GIBSON J. The plaintiff proved, that he had boarded and lodged the defendant's wife, for eighteen weeks, and there rested his cause. The defendant proved a personal notice not to trust her on his account, and also, the publication of a notice in the gazette, which the plaintiff acknowledged he had seen. The defendant then offered in evidence certain receipts, which referred to some previous agreement of separation, and for a monthly allowance of twenty-five dollars to the wife, and which were said to have been signed by persons who were authorised by the wife to receive the allowance. These were objected to, but admitted to go to the jury. The substantial objection is, not that they were inadmissible before a written agreement of separation was produced, or the usual ground laid for the admission of secondary evidence. Evidence is not considered secondary, where it carries with it no indication, that better remains behind;

(a) 11 Johns. 231.

(b) 6 Mod. 147.

1818. and here it did not appear that there was in fact, any written agreement. But the evidence was incompetent on another ground, to prove the payment, or raise an inference of any other fact from it; because, a man's receipt is not evidence to prove a payment against a third person; it is evidence against himself, but against another, his oath is better, and ought to be had where it is required. Here, the object was, to prove a payment, in pursuance of an agreement for an allowance for separate maintenance, which was a very material part of the defence. Those persons, therefore, who gave the receipts, should have been called.

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The second error assigned, is, that after the admission of all the defendant's evidence, the Court refused to permit the plaintiff to rebut it, by shewing the defendant had deserted his wife, and neglected to provide for her in a manner suitable to her degree. The counsel endeavour to support the decision of the Court, by saying the evidence was not rebutting, but direct, and therefore inadmissible at the stage at which it was offered; because, as it is said, the plaintiff could not have recovered on the case he at first made out, it being necessary, in addition, to shew that the defendant had turned his wife out of doors. Without professing to decide whether the husband is, in any case, liable for boarding and necessities, furnished the wife while living separate from him, when he has not refused to provide for her at home, I am of opinion, the evidence went directly to rebut the suggestion of a separate agreement. A separation by compulsion is quite a different thing from a separation by the agreement of the parties. It is immaterial, therefore, whether the plaintiff could have recovered on his direct evidence or not. If the defendant had thought he could not, he might have put his defence on that ground; but having given evidence, which he now says was unnecessary, he shall not say, the plaintiff had no right to produce counter evidence, because he at the same time necessarily cured an original defect in the case on which he had rested before the jury. The judgment is reversed.

Judgment reversed, and a *venire facias de novo* awarded.

FITCH and another *against* Ross and another.

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*Philadelphia.*

Monday,  
December 28.

THIS was a foreign attachment brought in this Court to March Term, 1814, by *Pelatih Fitch* and *Rufus Bacchus* against *David Ross* and *Baptist Loire*, in which two houses, the property of *Ross*, were attached and the tenants summoned. No property belonging to *Loire* was attached. On the 30th April, 1816, judgment was obtained, and a writ of inquiry returnable to December Term, 1816, was executed, under which the damages were assessed for the plaintiff, in the sum of 12,715 dollars. On the 20th February, 1818, a *feri facias* issued, returnable to March Term, which was levied on the two houses attached. On the 19th March, 1818, a rule was granted to shew cause, why the execution should not be set aside, on which the proceedings were staid; and on the 6th of the following July, a rule to shew cause, why the attachment should not be dissolved, was obtained, in support of which an affidavit was read, stating, that captain *David Ross* had, on the 6th January, 1818, fallen overboard from the brig *Edward*, of which he was master, while on a voyage from *Rio de la Plata* to *Barcelona*, and been lost.

It is not necessary that the plaintiff, in a foreign attachment, should, before the issuing of execution, give security for the restoration of the goods attached, if the defendant, within a year and a day should disprove the debt. He has until the sale.

The death of the defendant in a foreign attachment, after final judgment, does not dissolve the attachment. But the plaintiff must give security to the representatives of the defendant, who, within a year and a day, may come into Court, and proceed by writ of *scire facias*, *ad probationem debitum*, which puts the plaintiff to proof of his demand, and lets the representatives of the defendant into a full defence.

*Mahaney* and *Levy*, in support of the rules, contended,

1. That the *feri facias* had issued irregularly, because the plaintiffs had not previously given the security required by law, to restore the property attached, or its value, if within a year and a day the debt should be disproved. The 4th section of the act of 1705, indeed declares, that this security shall be given before sale, and after execution is awarded; but the practical construction of the law, which must always have weight, has been, that the security should be given before the execution actually issues. Prior to taking out execution, says *Sergeant*, in his *Treatise on the Law of Attachments in Pennsylvania*, 21. 35, the plaintiff must enter into a stipulation to restore, &c. if the defendant disprove or avoid the debt within the year and a day. The attachment law of 1705, is borrowed from the custom of *London*, *M<sup>r</sup> Glenachan v. M<sup>r</sup> Carty*; (a) and by the custom of *London*, security must be

(a) 1 Dall. 377.

1818. given before the award of execution, to which it is a condition precedent. *Serg. on Attach.* §2. 195. Some period must be fixed, from which the year and a day are to run. According to the custom of *London*, they are computed from the time the execution is taken out. *Leuknor v. Huntley*.<sup>(a)</sup> If the same rule prevail here, which is taken for granted by the counsel, *arguendo*, in *Meyers v. Urich*.<sup>(b)</sup> it supports the argument, that the stipulation must be entered into before the execution is issued.

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2. That the *feri facias* was void, because it was in the common form, and directed the sheriff to levy on the goods, &c. of the defendant in general terms. It ought to have recited the proceedings under the attachment, and pursued them by an order to levy on the property attached. The execution must pursue the judgment. 3 *Bl. Com.* 412. Here the judgment was against the property attached, and the execution ought to have been so too. The plaintiff cannot have execution against the body, or against the defendant's property in general. *Serg. on Attach.* 112. Yet in the present instance, he has taken out execution, not only against the general property, but against *Loire* also, none of whose property was attached, and against whom, therefore, there was no judgment.

3. That the death of the defendant, before the payment of the money, dissolved the attachment. Much more than a year had elapsed since the judgment was obtained, before the death of *Ross*, and yet no execution issued until six weeks after his death; nor was any refunding bond given. Much, therefore, remained to be done by the plaintiff to consummate his proceedings. Shall he then be permitted to avail himself of the death of the defendant, to recover a large sum of money without controversy, and without giving the defendant's representatives an opportunity of being heard? for this is the result, if the plaintiff succeeds. The object of a foreign attachment is twofold. 1st. To compel an appearance. 2d. If the defendant holds out, to give to the plaintiff the property attached, which, however, is very reluctantly done. When an appearance is effected, it proceeds like other suits. It is, therefore, very partially a proceeding *in rem*, and after an appearance it ceases to be so altogether, and becomes a proceeding *in personam*. It may be dissolved by

(a) *Cro. El.* 713.

(b) 1 *Binn.* 25.

the entry of special bail ; the debt may be disputed within a year and a day after the sale of the property, and after verdict, judgment, and execution against the garnishee, the defendant may dissolve the attachment by the entry of bail, provided the money be not paid. The defendant has as long as he pleases to enter bail, provided he does it before that period. *Lex neminem cogit ad impossibilia*. Ross is dead. Will the Court permit steps to be taken, to compel an appearance, which a Superior Power has rendered impossible? In *Ludlow v. Bingham*,<sup>(a)</sup> the counsel in argument state, that the death of the defendant, after interlocutory judgment, will abate the attachment, and in a note a *quere* is put as to the effect of death after final judgment, but before the payment of the money. In personal suits at common law, death, *pendente lite*, always abated the suit ; and even in partition, until 8 & 9 Wm. III. ch. 31, if one of several defendants died, the writ abated, and so was the law of domestic attachments until 1807. This, therefore, is not entirely a proceeding *in rem*. It differs altogether from an admiralty proceeding in case of prize. In proceedings *in rem*, the proceeding is exclusively against the *res* to determine to whom the property belongs ; the only question is, to whom does the *res* belong. (This Mr. Binney denied, and cited the following cases. 2 *Browne's Admiralty Law*, 396, 397, 398. 406. relating to proceedings against the ship for seamen's wages ; and said, that with respect to most proceedings *in rem*, they are not to inquire to whom the property belongs, but to enforce orders of the Court, &c.) The proceedings for seamen's wages are not purely *in rem*. Nor is it denied, that a foreign attachment is partially so ; but it only possesses that character where special bail is not entered, and the *res* is appropriated. In *replevin*, *detinue*, and all the common law remedies for a specific thing, the suit is abated by death. The same rule prevails in regard to sequestrations out of chancery, and outlawries. Sequestration is in the nature either of mesne process or of execution. Where it is in the nature of mesne process it determines by the death of the party ; but if in the nature of execution, the death of the party does not determine it. 6 *Bac. Ab.* 126. *Sequestration*, A. *Id.* 127. *Id.* 134. *D. Burdett v. Rockey*.<sup>(b)</sup> *Bligh v. Earl of Darnley*.<sup>(c)</sup> In

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(a) 4 *Dall.* 60.(b) 1 *Vern.* 58.(c) 2 *P. Wms.* 621.

1818. outlawry in civil cases, the king's perjury of the profits ceases on the death of the defendant; and there is no difference between outlawry before and after judgment. *5 Bac. Ab. 224. Outlawry, D. Smarte v. Edsun.* (a) *Matthews v. Erbo.* (b) The common law rule that suits abate by the death of the defendant applies with peculiar force to cases of foreign attachment. Here the attachment was solely against the goods of one of two defendants. If *Ross* had entered special bail he would have relieved the property attached. He was guilty of no laches. Laches is the failure to do a thing within the time allowed by law. *Ross* had until the payment of the money to enter special bail, and before the time had expired he was prevented by an event over which he had no controul. The permission to the defendant to come in is not a privilege, but a mere act of justice. If he had been living, he might have controverted the plaintiff's claim, and his death, which he could not prevent, ought not to put the plaintiff in a better situation, for it is greatly to be doubted, whether the defendants' executor could controvert the debt within a year and a day. The bond would, therefore, be of no use. The opposite argument derives no support from the case of bail, where, if the principal dies after the return of *non est inventus* the bail is fixed, because a surrender after *non est inventus* is a mere matter of courtesy and against strict law.

*Binney* against the rules. The *feri facias* issued in this case, is contended to be erroneous in the first place, because no security was previously given. Our only guide on this subject is the act of assembly of 1705, which does not require security to be given before execution is issued, but before sale and after execution is awarded. The words are plain, and there is no decision of this Court giving them a construction different from that which they naturally bear. This security was provided for the benefit of the defendant, and the later it is given, the more it is for his advantage, because he has a year and a day to come in and disprove the debt, from the date of the bond. In its general features the attachment law resembles the custom of *London*, but in practice it departs from it in some respects. By the custom, security is given before execution is awarded; by our act of

(a) 2 Lev. 50.

(b) Carth. 459.

assembly, by express words, after. *Sergeant* (21. 35.) refers to no authority but the act of assembly, and that authorises the bond to be taken at any time before sale. 1818.  
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2. The second objection is one of mere form. The *feri facias* was in the form used in our Courts without exception; and if wrong, the Court would amend it. It was regularly executed, and if it had been levied on property which had not been attached, the Court would have given relief. There is no such thing as a special *feri facias* for the property attached, nor is there any authority in counsel or prothonotaries to mould special writs. FINCH  
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3. If this were a common law judgment, the death of the defendant would not affect the execution, for it was tested before his death, and it is perfectly clear, that an execution may be taken out against the property of the dead, provided the teste be before the death. If a defendant die in vacation, an execution may be taken out, returnable to the next Term, if it bear teste prior to his death. *Oades v. Woodward*, (a) 10 Vin. 570. *Execution*, pl. 9. *Finch v. Earl of Winchelsea*, (b)

It is objected too, that the judgment is irregular, because it is against both defendants, when the property of one only, was attached. The answer is, that the judgment was properly against neither. The judgment was, that the plaintiff should have execution against the property attached, not that he should recover the money of the defendants. By the custom of *London* there is no judgment; but after four defaults, the garnishees are summoned, who plead *nil debent*, and the issue being found against them, to ascertain the amount in money, there is an award of execution against the money in their hands. *Serg. on Attach.* 239. Appx. The attachment is not to bring the party into Court; the object of it is to give the party execution against the thing attached. He has no day in Court. It is a proceeding *in rem* and not *in personam*. *Serg.* 110. And so it is declared in *Phelps v. Holker*, (c) and in *Kilburn v. Woodworth*, (d) in both of which it was decided, that an action would not lie on a judgment in foreign attachment. The authorities all shew it to be a proceeding *in rem*, making no person whatever liable, and ex-

(a) 2 *Ld. Raym.* 349.

(c) 1 *Dall.* 264.

(b) 3 *P. Wms.* 399. note.

(d) 5 *Johns.* 37.



1818. *Philadelphia.* *Firren and another v. Ross and another.* tending only to the things attached. If so, how can the death of the defendant affect the thing, or the proceeding upon it? There is nothing to support the idea, that death after interlocutory judgment abates the attachment, but an argument attributed to counsel in *Ludlow v. Bingham*. This, however, must be incorrectly reported, for the eminent counsel to whom it is ascribed, knew that in a foreign attachment, there is never a party in Court, which he is supposed to make the basis of the argument. The case of sequestration in chancery, and outlawry in the courts of common law, are totally different from foreign attachments. They are altogether proceedings *in personam*, against a party in contempt; and death purges all contempts. There are, however, some sequestrations in the nature of execution, and these are not determined by death. 1 *Vern.* 58. The admiralty courts are the tribunals in which the proceedings are *in rem*, and no instance can be shewn in which, after decree, the death of the party destroyed the proceeding *in rem*. The object of the attachment law, is not, as the opposite argument supposes, to compel an appearance, but to make the property of absentees liable for their debts. To dissolve the attachment is the privilege of the defendant, and he must use it consistently with the plaintiff's security. The object in entering special bail is to discharge the garnishee; when there is no garnishee, there is no bail. It is said, that death is equivalent to special bail; but the argument in fact goes much further, and makes it equivalent to special bail and an *exoneretur*. It places absentees on much better ground than those who are present; for if a *fieri facias* be issued against one who is present, and he dies, it is good; but if against an absentee, who dies after the sheriff has levied, the levy is gone. This could never have been the intention of the act of assembly. The defendant might have dissolved the attachment by the entry of special bail. This he neglected to do until it became impossible, and the plaintiff ought not to be injured by his laches. At common law, special bail has until the return of the *scire facias* against him, to surrender his principal, but if the principal die, after the return of *non est inventus*, to a *capias ad satisfaciendum* against the defendant, the bail is fixed.

DUNCAN J. If the action is not abated or dissolved by the death of the defendant, the proceedings on it are regular.

An execution, tested as of a term when the defendant was alive, may be taken out and executed after his death. To make a *scire facias* necessary, the process must appear on its face, to have issued after the death of the party. Whatever may be the practice under the custom of *London*, as to giving security to restore the goods and effects, if the debt be disproved, before execution be taken out, a different practice has prevailed here, justified by the act regulating proceedings on foreign attachments; "after judgment obtained, the plaintiff shall, before sale, and after execution awarded, find security." He has all the time before sale, and after execution awarded, by the plain letter of the law. But the question, whether after a final judgment against the defendant in attachment, his death *ipso facto* dissolves it, is of more difficulty. Although this case must have often occurred; yet the objection is not known to have been made in any authenticated case in *Pennsylvania*. The research of counsel has not been able to find it even to have been made in *England*. It is a question, new in species. The proceedings under our attachment law, may have their origin in the custom of *London*, but the remedy itself, is not to be extended or limited by rules established under the custom, where such rules are broader or narrower than the laws of this state. *Fisher v. Consequa*, in the Circuit Court of the *United States*, *Sergt. on Attach.* 47. Nor does the course of proceeding conform to the custom; there, process issues against the original debtor on which *nihil* is returned, and his default recorded, on which there is a surmise, that there is another man within the city indebted to the defendant, and the *scire facias* issues against such debtor, as the garnishee. Here the first process is to attach the defendant, by his goods and chattels, in whose hands soever they may be found. On the return "attached," at the third term judgment is entered. The action was *indebitatus assumpsit*, judgment entered the third term, writ of inquiry, and judgment final.

Lands are the subject of foreign attachment in *Pennsylvania*, in which there can be no garnishee, and therefore the practice has been, on the judgment against the defendant, to issue execution, with directions to the sheriff to levy on the lands attached. If these proceedings were in all respects in *rem*, they would not abate by the death of the defendant. For some purposes they are to be so considered; for execution

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can only be against the goods attached, and not against the person of the defendant; but to every purpose they are not; for by entering special bail, the attachment is dissolved, and it then becomes a mere personal action.

Foreign attachment is a peculiar process to compel the appearance of the non-resident debtor, by distress and sale of the property attached, giving him full time to appear, even after judgment and execution, and contest the demand and even disprove the debt, within a year and a day after security given, without entering special bail. The declared object of the act, was to prevent non-residents from withdrawing their effects from the State, leaving their debts unpaid. This object would be defeated, if, after the plaintiff has run the tedious course of the law, and when he is about to reap the benefits of his pursuit, the death of the defendant dissolved all; and his representatives, too, would be at liberty to withdraw from the State, the effects which had been condemned to pay the judgment against him.

By the entry of special bail, the object of the law is attained. It gives the plaintiff security, by the body, the highest security known to the law. But if death dissolves the attachment, the plaintiff is deprived of all security, either of body or goods. If special bail is entered, and the defendant die pending the action, under an act of assembly, his representatives may be brought into Court in that action; the action does not finally abate. If lands are attached, and final judgment obtained, it could not be, that by the defendant's death, the judgment becomes extinct, and the plaintiff come in for distribution only, as a simple contract creditor.

If death would take away the lien, bankruptcy would. But in bankruptcy it is considered, that the attachment creditor, when execution is executed, still retains his lien. See the *Bankrupt Law of the United States*. That act takes away the lien by attachment under any law of the individual states, except where the execution is executed. A foreign attachment on the custom of the Mayor's Court, is not dissolved by the bankruptcy of the defendant, unless the act of bankruptcy over-reach the attachment. This may be clearly inferred from the case of *Barker v. Goodair*, 11 Ves. jr. 78. By the certificate of bankruptcy, the body is as much relieved from arrest as by death. A foreign attachment would not be dissolved on the application of assignees, praying that an

~~exoneretur~~ might be entered ; nor could special bail be taken from a man who could not be surrendered, or if surrendered, would, on production of his certificate, be discharged from imprisonment. Until special bail is entered, the lien continues. This question must arise under the arbitration system. There the entry of the award by the prothonotary, has the effect of a judgment ; but the law gives the defendant dissatisfied, the right of appeal within twenty days, on making oath or affirmation, that the appeal is not entered for delay, &c. and giving special bail. If the party dies within the twenty days, does the award and the judgment die with him ? For the same reason would hold in that case as in this ; the impossibility of giving special bail. What have the Court decided in actions against executors or administrators, or against corporations ? That they may appeal without entering special bail. In the case which I have put, I apprehend the Courts would suffer the executor or administrator of the deceased defendant, who died within the twenty days, to make themselves parties to the suit within that time, and enter the appeal without giving special bail.

The right to dissolve the attachment depends on the condition of entering special bail. It is said, that having time until after the sale, to enter special bail, the act of God, which injures no man, depriving the party of the benefit of this condition, dispenses with the condition and extinguishes the attachment. But this would injure the plaintiff. It then becomes the duty of the Court, by an equitable construction of the act, to do justice to all, by directing security to be given to the representatives of the deceased. Then a year and a day is given them, to come into Court and proceed by writ of *scire facias ad disprobandum debitum*, which, like putting in bail, puts the plaintiff to the legal proof of the demand, and lets the defendant into a full defence ; for this is the substantial operation of the security. *M'Clenachan v. M'Carty*, 1 *Dall.* 378. If the Court did not think they were justified in this construction, they would have entertained a very different opinion from that which they have formed ; because it would be against every principle of justice and of law, to deprive the representatives of the defendant of all opportunity of contesting the plaintiff's claim ; but on the *scire facias* every opportunity is given them of a hearing, and of a full defence, as if the defendants had entered special bail. The

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and another.

1818. Court are of opinion, that the death of the defendant in a foreign attachment, after final judgment, does not abate or dissolve the attachment. The rule must, therefore, be discharged.

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Rule discharged.

## APPENDIX.

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*The following opinions were mislaid, when the cases to which they respectively belong, went to press.*

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1818.

Sunbury.

### BURNS *against* BURNS.

(See page 295, *ante*.)

GIBSON J. There is no doubt but a will actually cancelled, must be re-executed, before it can have effect. *Burtonshaw v. Gilbert, Cowp.* 49. And any act evincing an intention to cancel, although actual cancellation be not effected, will amount to a revocation. *Bibb v. Thomas, Black. Rep.* 1043. That was a revocation by attempting to cancel, although the will, which was partly torn and thrown on the fire, fell off, and was picked up by a bye-stander; the testator, not having done any after act to evince a change of intention, this was held to be a revocation. But *Hyde v. Hyde, 1 Eq. Ca. Abr.* 409. *Ch. Rep.* 55, S. C., comes nearer the present case, than any other I have found in the books. A man had a will executed pursuant to the statute of frauds; and designing to make some alterations, sent for a scrivener, and got him to prepare a new will, which the testator read and approved of; on which he pulls out of his pocket, the first will, and tears off the seals from the first eight sheets, which the scrivener seeing, asked him what he was doing? "Why," says he, "*I am cancelling my first will.*" "Pray," says the scrivener, "Hold your hand, the other will is not perfected; it will not pass real estate, for want of being executed according to the statute of frauds." "I am sorry for that," replies the testator, and immediately desists from tearing off any more of the seals; and in a short time after, dies, without having done any thing further to perfect the

1818.  
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second will, or complete the cancelling of the first. It was held, the tearing off the first eight seals, not being done *animo cancellandi*, (as it is said in the report,) was no revocation, and that the seal remaining whole to the last sheet, was sufficient. There was indeed, no revocation, but clearly not for the reason expressed in the report, that the acts of tearing, were not done *animo cancellandi*; for the testator expressly declared, at the time, that he was cancelling his first will. *It was because the act by which he intended to revoke, was not complete, when he changed his mind.* It would be dangerous, and destructive of all certainty, to say, that where there was an actual intention to cancel, at the time of the act done, that intention should not be carried into effect, because the testator may have been under a mistaken impression as to the existence of any collateral fact, that constituted the motive of the act; and that therefore he intended to revoke, only on condition, that the fact was as he supposed it to be. In *Hyde v. Hyde*, as in the present instance, there was an intention to revoke in a particular way, and no other; by a particular act, and by no other. Shall the revocation be complete, before the act be complete, by which it is intended to be effected; and may not the testator, at any time previous to completion of the act, change his mind, without being under the necessity of republishing his will? Suppose, that, intending to burn it, he takes the will from his desk, and advancing towards the fire, changes his intention and returns it to its place; would this be a revocation? and if not, would his going a step further, and attempting to throw it on the fire be more so, if he picked it up, and, by any after act, evinced a change of intention? Where, indeed, there has been no change of intention, and the testator, as in *Bibb v. Thomas*, continues to believe his will actually destroyed or cancelled, or evinces a continuation of intention, that the instrument shall not have validity at his death, the imperfect act, joined to a continued intention of revocation, shall be equivalent to the act itself; for it would be unjust, that a man's intention should fail of effect, from an accidental cause. But an intervening change of intention makes a very different case. The reason is, that actual cancellation is an *express* revocation; while an act, evincing an *intention* to cancel, is but *presumptive*, and stands for an actual revocation, only till an intention to the contrary appears, the matter being

susceptible of explanation by evidence; where, therefore, the intention to revoke is changed, before the act by which it is intended to be effected is executed, the paper, which never ceased to be the will of the party, will stand on the original proof. It is true, in conclusion, the judge told the jury, that if they believed the testator to the last intended the paper in question to be his will, they ought to find for the plaintiff; but he also stated as a general and governing principle, that a will intended to be cancelled, can be "*resuscitated*" in the same manner, and by the same proof only, that would be sufficient to establish it, in the first instance. In this, there was error; and granting the conclusion of the charge was contradictory to this principle, it does not cure the defect: the jury were left without any rule to guide them. The judgment must be reversed.

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### PIPHER *against* LODGE.

(See page 310, *ante*.)

GIBSON J. Where there are articles for a purchase, a trust immediately results to the purchaser. This trust is not express, but one which the law implies, (*Cruise Dig.* tit. 12. ch. 1. s. 29, 30.) and it is clear law, that in cases of implied trusts the statute runs. At this day, the distinction in this respect between express and implied trusts is well settled; and although the cases are not authority here, I have no hesitation in adopting it, on account of its convenience and intrinsic good sense. Where the vendee has entitled himself to a conveyance by performing every thing to be done on his part, and thereby acquired, what, in this state, may be called an equitable right of entry, why should he not be bound to call for the possession of the land within one-and-twenty years? The main intent of every statute of limitation is to compel men to settle their controversies while facts are recent, and the recollection of the witnesses is fresh, and before the witnesses themselves pass away. In the case of an implied trust, every inconvenience arises from delay, that

*Vide Townsend v. Townsend*, 1 Bro. C. C. 550. (append.) 2 *Maddock's Chancery*, 334, *Beckford v. Wade*, 17 Ves. 37.

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1818. would arise from it after an actual disseisin. In fact, the  
*Sundbery.* present instance is an example : the authenticity of the paper  
 on which the plaintiff below founded his title, was disputed ;  
 and the subscribing witness and the grantor being both dead,  
 the evidence of the hand-writing of the latter, left it very  
 doubtful whether his signature were genuine or forged ; but  
 all doubt might readily have been removed, if the suit had  
 been brought in due season. In the case of an *express* trust,  
 a good reason always appears on the face of the trust itself,  
 why the *cestui que trust* should not call for the possession,  
 and therefore no laches is imputable to him ; but where he is  
 entitled to the possession, and neglects to call for it, and can  
 assign no reason why he did neglect, the case is very differ-  
 ent. I should hold the possession of the vendor adverse,  
 from the moment he was bound to execute a deed, and sur-  
 render the possession ; for, from that moment he is as much  
 a wrong-doer, as if he had withheld the possession, after the  
 execution of the trust, by delivery of a conveyance, and the  
 vendee has a right of entry equally effective for the purpose  
 of maintaining an ejectment. Sometimes a trust arises *ex*  
*maleficio* ; as where fraud is committed in obtaining a convey-  
 ance ; in which case the grantee will be considered in equity  
 as a trustee for the real owner ; and although no time will  
 bar a bill for a *discovery* of the fraud, yet it would be going  
 very far to say, the possession of such trustee is not ad-  
 verse from the moment the fraud is known. In one par-  
 ticular, there is a very material difference between the sta-  
 tutes of limitations here and in *England*. There those sta-  
 tutes fix certain periods, in which real and personal actions  
 must be brought in the courts of *common law*, without ex-  
 tending their provisions to suits in equity. It is true, indeed,  
 that on account of their convenience, they have been adopted  
 in chancery ; but rather as rules of practice, than as provi-  
 sions of positive law. In many cases, however, and among  
 others, in *express trusts*, chancery has refused to adopt the  
 statute of limitations. But although in *Pennsylvania* the  
 action of ejectment comes in the stead of the bill for per-  
 formance of a trust, yet the application of these statutes does  
 not, as in chancery, rest in the discretion of the Court ; the  
 statute being a flat bar to every right of entry that will sup-  
 port an ejectment, where the possession has been adverse. In  
*England*, it is an undoubted rule, in cases of *express* trust,

that the possession of the trustee, is the possession of the *cestui que trust*, and in that respect I would follow the *English Sumbury*. 1818.  
 practice ; but where the parties meant to create no trust, but a trust is raised by operation of law, there is nothing in the mere circumstance of its existence, to presume the possession of the trustee, to have been otherwise than adverse ; the privity or assent of the *cestui que trust*, must be shewn as in other cases.

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 v.  
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But even if the rule were otherwise, the Court erred in saying, that between *Reuben Haines* and *Lodge*, or those claiming under him, there *could* be no such thing as an adverse possession. *Lodge* was in possession when he purchased, and continued so till his death in 1783, the purchase money being all paid. Shortly after this, his widow and children having abandoned the premises, *Haines* entered. For what purpose did he enter? Not to preserve the possession for *Lodge's* heirs : that was not his concern. Nothing remained to be done on his part but to execute a conveyance : he could do no other act in performance of the trust. As trustee, he had nothing to do with the possession ; and therefore no presumption arises that he entered as a trustee ; and if in fact he disclaimed the trust at the time, his entry was equivalent to an actual ouster, and the possession he acquired was adverse. This possibly might have been collected from the evidence, and the Court should have directed the jury, that if they were of opinion that such was the fact, the statute interposed a bar.



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#### ACKNOWLEDGMENT.

The certificate of the acknowledgment of a deed, by a married woman, for the conveyance of her lands under the act of 24th February, 1770, ought to state substantially, that she was separately examined, that she had a knowledge of the nature and consequences of the act she was about to perform, and that her will in the performance, of it was free. Therefore, a certificate merely stating, that she was of full age, and separately and apart examined, and the contents of the deed made known to her, without mentioning, that she voluntarily consented to the execution of it, is insufficient. *Evans v. The Commonwealth.* 272

#### ACTION.

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1. An action founded upon a transaction prohibited by a statute cannot be maintained, although a penalty be imposed for violating the law, and it be not expressly declared, that the contract is void. *Seidenbender v. Charles's administrators.* 151
2. An action to recover a legacy, charged upon real estate, cannot be supported against the devisee and terre-tenants of the land without an express promise to pay it. *Brown v. Furer.* 213
3. It seems, that the action should be brought against the executor and terre-tenants; and the judgment should be so entered as to charge the land only, and not the persons, of the defendants. *ibid.*
4. A, and B, being in possession as tenants in common, of land, the title to which was contested, and to secure which it might be necessary to expend considerable sums of money, entered into an agreement, by which B, covenanted to bear an equal proportion of the expenses incurred or which might be incurred by A, in vindicating their title or extinguishing adverse

claims. A, having had the legal title conveyed to himself alone, it was held, that he might maintain a suit for the recovery of B's moiety of the expense, without having previously conveyed to B, a moiety of the land; but as a court of chancery would compel A, to convey the legal estate before he could be permitted to recover the money which B, had agreed to pay, in contemplation of obtaining a legal title, a court of law in Pennsylvania, will stay the execution, until the legal estate in a moiety of the land, be conveyed to B. *Swearingen's executor v. Pendleton's executor.* 389

5. A personal action may be sustained in the common law courts of Pennsylvania, for the recovery of legacies charged upon land. It seems, that the executor should be made a party to the suit, or, at least, should have notice with liberty to appear and plead. *Gause v. Wiley.* 509

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1. If in an action of trover, under the act of 29th March, 1814, an alderman or justice of the peace render judgment for the defendant, the plaintiff, if his demand of damages for the injury sustained, exceed five dollars and thirty-three cents, has the right of appeal. *Stewart v. Keenle*. 72
2. No appeal lies from the judgment of a justice of the peace in a matter exceeding one hundred dollars, referred to him by consent, under the 14th section of the act of 30th March, 1810. Nor will any act done by the appellee, tending to shew an acquiescence in the appeal, render it good. *Morrison v. Weaver*. 190
3. When, upon an appeal by the defendant from an award of arbitrators, the verdict of the jury is for a less sum than the award, the plaintiff is not entitled to recover the costs accruing upon the appeal. *Landis v. Shaeffer*. 196
4. It is not necessary, that in all cases a recognition on an appeal from an award of arbitrators, should be in the very words of the act of assembly. *Witman v. Ely*. 260

**APPRENTICE.**

1. An indenture binding an apprentice to a man, his heirs and assigns, without naming executors, cannot be assigned by his executors. *Commonwealth v. King*. 109
2. Query, Whether the executor is liable on the covenants, to provide meat, drink, and clothing, &c. though not liable on the covenant to instruct. *ibid.*

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**ARBITRATION.**See **APPEAL**, 4. **AWARD**, 3.

1. It seems that account render, is not within the purview of the arbitration law. If it be, the arbitrators must not only perform the office of a jury, in case they deem the defendant liable to account; but also of auditors, in settling the account. Therefore, an award merely, that the defendant do account, is bad. *Jones v. Stratton*. 76

2. An affidavit by an appellant under the 11th section of the act of 20th March, 1810, "that it is not for the purpose of delay, such appeal is entered, but because he believes injustice has been done," is not sufficient. The affidavit must contain the word "*firmly*," applied to the appellants belief, or something equal to it in substance. *Thompson v. White*. 135
3. When the jurisdiction of the arbitrators has completely attached, the cause is out of Court, and the Court cannot enquire into the proceedings before the arbitrators; the only remedy is by appeal. *ibid.*
4. The Court may enquire of those things which the law requires to be done before the jurisdiction vests. *ibid.*
5. If it should appear on the face of the award, that the arbitrators have exceeded their jurisdiction, or that the award is contrary to law, it is subject to reversal on a writ of error, if the suit be depending in an inferior Court; and if depending in this Court, it may be set aside. *ibid.*
6. Query, Whether an inferior Court can set aside an award in such cases. *ibid.*
7. A rule of arbitration, under the act of 30th March, 1810, is not vitiated by containing a submission of "all matters in variance between the parties in the cases," instead of "all matters in variance in the cause between the parties." *Sheemaber v. Mayor*. 452

**ARBITRATORS.**See **ARBITRATION**, 3, 4, 5. **AWARD**, 1, 2. **APPEAL**, 3, 4.

If two causes between the same parties are investigated and decided by the same arbitrators at the same time, they are entitled to be paid, only for the number of days actually spent in the investigation of both cases, and cannot make a distinct charge for each case. *Stward v. Hutchinson*. 81

**ASSIGNMENT.**

Where a bond has been assigned agreeably to the act of assembly of 28th May, 1715, a payment made by the obligor, to the obligee before notice of the assignment, is good. *Bury v. Hartman*. 175

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1. One award having been made in two actions submitted to the same arbitrators, the Court set it aside. *The Commonwealth v. Maria*. 81
2. An award ought to be certain and final. If arbitrators award a sum of money to be paid as the consideration of a tract of land,

and add, that all the legal and equitable claims against the land, are to be deducted from the award, without finding the amount of such claims, the award is bad. *Spalding v. Irish.* 823

3. An award directing money to be paid by instalments, is void. *Sheemaker v. May-er.* 452

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### CERTIORARI.

The 29d section of the act of 30th March, 1810, which declares, that the judgment of the Court of Common Pleas, shall be final on all proceedings removed by certiorari, from before justices of the peace, and that no writ of error shall issue thereon, is confined to certioraris issued under it, and does not extend to a case which was removed prior to the act. *Love v. Barton.* 269

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### COMMISSIONS.

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1. An action of trespass on the case, lies against a corporation aggregate for a tort. *The Chesnut-Hill & Spring-House Turnpike Company v. Rutter.* 6
2. It seems that if the narr. state, that the act complained of, was unjustly and wrongfully done, without setting forth negatively, that it was not within the scope of the corporate powers of the company, it is sufficient; at all events it is good after verdict. *Ibid.*

### COSTS.

See ARBITRATORS. EJECTMENT, 2.

1. Under the existing acts of assembly, in all cases where this Court has jurisdiction, costs are of course. Therefore a plaintiff is entitled to costs, although he recover less than 50 pounds, provided the matter in controversy be 500 dollars, or upwards. *Wurts v. McFadden.* 78
2. If a declaration on a policy of insurance, contain a count for a total loss, and a count for money had and received, &c., for a return of premiums, and the jury find a verdict for the defendant on the first count, and on the count for money had and received, &c., a verdict for the plaintiff, for a less sum than 500 dollars, the plaintiff is entitled to costs; all disputes arising out of the same policy being the matter in controversy between the parties. *Ibid.*
3. If a defendant be acquitted on an indictment founded on the act of 31st March, 1806, to restrain the practice of duelling, the jury may direct, that he shall pay the costs, although the indictment be defective. *The Commonwealth v. Tighman.* 137
4. In an action of trespass *quare clausum frangit*, if the jury find less than forty shillings damages for the plaintiff and full costs, he is entitled to recover full costs, though there is no certificate by the Judge agreeably to the 16th sect. of the stat. 23 and 23. C. II. c. 9., that the freehold or title of the land was chiefly in question. *Hinds v. Knox.* 417
5. Costs upon an indictment are remitted, by a pardon before judgment. *Duncan v. The Commonwealth.* 449
6. If the grand jury return a bill "*ignoramus*," in a case other than felony, and order the prosecutor to pay the costs, and the prosecutor, having been sentenced by the Court to pay them, is committed, and then discharged according to law, without having paid them, the county is not liable to costs. *The Commonwealth v. The Commissioners of Philadelphia County.* 541
7. Nor is the county liable, if a bill be found "a true bill," and the defendant, having been tried and acquitted, and ordered by the petit jury to pay the costs, is sentenced by the Court to pay them, and is com-

mitted and discharged according to law, the costs not being paid. *ibid.*

2. Nor, if the defendant is acquitted, and the prosecutor ordered by the petit jury to pay the costs, who, after being sentenced by the Court to pay them, is committed and discharged according to law, the costs being unpaid. *ibid.*

#### COUNTY COMMISSIONERS.

1. The Court will not grant a *mandamus* to County Commissioners to compel the payment of interest on an order drawn by them, on the county treasurer. *Commonwealth v. Commissioners of Philadelphia County.* 135
2. The law will not imply a promise to pay debts due from a county by individuals, who when the suit was brought, were county commissioners, but who were not so when the debts originated, and who had ceased to be so, before the suit was tried. *Lyon v. Adams.* 443
3. *Query.* Whether county commissioners constitute a corporation liable to be sued? If they do, the suit should be against the corporation, without naming the commissioners individually. *ibid.*
4. It seems however, that the only remedy for the recovery of debts from a county, in such case, is, by applying for a *mandamus*, commanding the commissioners to draw an order on the county treasurer. *ibid.*

#### COURT.

See NEW TRIAL. ERROR, 3, 4.

1. The Court are not bound to instruct the jury to find for either party on the whole evidence. It is merely their duty to inform them as to the law, leaving the decision of the facts entirely to them. *Galbraith v. Black.* 207
2. Where a Judge has expressed himself in such a manner as to be understood by the jury, this Court will not reverse the judgment on critical objections to his language. *ibid.*
3. The Court may express an opinion on the facts of a case, without at the same time informing the jury, that they may and ought to judge for themselves; but nothing should appear in the charge from which the jury may reasonably infer, that they are precluded from considering the facts. *Sampson v. Sampson.* 329
4. The Court are not bound to answer an abstract question, without applying the general principles of law to the case before the jury, and making such observations and distinctions, as they may deem necessary. *Graham v. Moore.* 467
5. The time and manner of examining witnesses, is in the discretion of the Court, before whom the trial takes place. *Duncan v. M'Cullough.* 490
6. Under what circumstances the Court will

refuse to permit the plaintiff to introduce new evidence, after the defendant's counsel has begun to address the jury. *ibid.*

7. *Query.* Whether this Court will reverse for error, on a point in which the law permits the inferior Court to exercise their discretion? *ibid.*
8. The last Monday in July is merely a Court to receive the return of writs, and to make rules and orders preparatory to trials. It is not a Term, at which a judgment can be taken for want of an appearance. *Insurance Company of Pennsylvania v. Passmore.* 507

#### COURT OF APPEAL.

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#### DEED.

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#### DEFALCATION.

See EVIDENCE, 13.

#### DEPOSITION.

See EVIDENCE, 17. 19. 35. WITNESS, 14.

#### DESCENT.

One having made a small improvement on vacant land, without having made any settlement, or had any view to residence, died, and after his death a warrant to include his improvement, was taken out by his brother for the benefit of the daughter of the deceased, which was paid for with funds derived from her father; *held*, that the estate did not come to her *ex parte paterna*, but was a new acquisition, which on her death would descend to her brother of the half blood on the mother's side, in preference to more remote kindred of the whole blood. *Simpson v. Hall.* 337

#### DEVASTAVIT.

See EXECUTOR, 2, 3, 4.

#### DEVISE.

1. A testator devised his real estate to D, C, and R, T, in trust as to one equal half part for the use of his "old friend, companion, and house-keeper, E, H,; and as to the other half part for the use of his natural son, J, L,; the survivor of either to

possess the whole of the said estate by will or otherwise." He afterwards, at different times, added the following codicils. First codicil. "I do make this codicil in alteration and addition of the within, viz. One thing was omitted in the above recited testament, of mention made, (as was intended,) in case of no legitimate heirs of the bodies of the two legatees, or ere (either) one of them, that after his or her decease, it should revert to the heirs of my sister, J, S, wife of G, S, to be equally divided between them as my next of kin, who have deserved of me by writing, &c. lately, the others being provided for." Second codicil. "I do authorise, and request my good friends, D, C, and R, T, on account of an unfortunate intoxication of my house-keeper since said will, that they would proportion her subsistence, which I wish and will to be not less than 12*l.* per annum, or more than 20*l.* paid quarterly, or upon good behaviour, and her remaining ten or twelve miles out of Easton, and that she or any other person may be prevented from wasting my estate, as the reversion of the same is left to my sister, J, S's, children, as per codicil of my former will." Third codicil. "I am willing to allow my house-keeper, E, H, one furnished room in the house I now occupy, during her natural life, and 20*l.* a year, paid monthly, if required by her or order; but no part of the property of said room, or monthly allowance, shall be disposed of by her, she being for the most part insane." *Held*, that E, H, and J, L, did not take cross-remainders; but that on the death of E, H, without issue, the moiety of the estate devised to her went immediately to the children of J, S, the testator's sister, to be equally divided between them in fee simple. *Simpson v. Coon.* 368

2. Devise. "I order the place whereon I now dwell to my daughter S, she paying two-thirds of the value thereof to her two sisters, S, and M, and the land I lately purchased of R, T, I give and bequeath to my daughter B, to be inherited by her and her heirs lawfully begotten of her body; and if either of my said children die without issue, that then the inheritance is to descend to the next elder, dividing the value equally amongst the survivors, or the lawful heirs of them; all my said land to descend to the lawful heirs, from generation to generation. S, took an estate tail. *Gause v. Wiley.* 509

#### DEVISEE.

See ACTION, 2, 3.

#### DISSEISIN.

See LIMITATIONS, ACT OF, 2.

#### DUELLING.

See COSTS, 3.

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#### EJECTMENT.

See EVIDENCE, 25.

1. The Court will not, on a motion for an order, that the sheriff perfect the title to lands sold by the late sheriff on a *venditioni exponas*, inquire, whether the judgment on which the sale was founded, were unfairly obtained, but will leave that question to be tried in an ejectment by those who are interested in establishing the fraud. *Field v. Earle.* 82
2. If a plaintiff in ejectment, in the form prescribed by the acts of 21st March, 1806, and 13th April, 1807, convey the title pending the suit, he may, nevertheless, proceed to recover damages and costs. *Murray v. Garretson.* 130
3. A variance in the description between the writ and the statement filed, in an ejectment under the act of 21st March, 1806, is cured by verdict. *Thomas v. Culp.* 271
4. What is a sufficient description of the land under that act. *ibid.*
5. After issue joined in an action of ejectment, in the form prescribed by the act of 21st March, 1806, it is too late to plead, that in the description filed, the name of the township in which the land lies is omitted. This is a matter which should be pleaded in abatement. *Lyons v. Miller.* 279
6. What is a sufficient description of the land, agreeably to the act of 21st March, 1806? *ibid.*
7. In Pennsylvania, that is to be considered as already done, which chancery would enforce the performance of. Where, therefore, a plaintiff cannot enforce a specific execution of his contract against the defendant, or those under whom he claims, he cannot recover in ejectment. He cannot recover without having paid or tendered the purchase money, before bringing suit. *Vincent v. The lessee of Huff.* 293

#### ERROR.

See COURT, 2. 6. PLEADING, 2. EXECUTORS, 3. WITNESS, 8.

1. It is error for the Court to leave it to the jury to determine the construction of an award in writing. *Moore v. Miller.* 279
2. If the Court on being requested, refuse to instruct the jury on a point of law, it is error. *Vincent v. The lessee of Huff.* 293
3. If counsel request the Court to instruct the jury on a material point, and they omit to do so, it is error. *Humes v. McFarlane.* 437
4. If a point be placed fairly before the jury, and the Court give an opinion on the facts in favour of one party, but give it merely as opinion, and not as a direction binding on the jury, it is not error. *Porter v. McIlroy.* 436

#### ESTATE.

See DEVISE, 1.



## ESTATE TAIL.

See *DEVISE*, 2.

Has an estate tail charged with the payment of a legacy, be sold under an execution, for the purpose of raising the legacy, a fee simple passes to the purchaser. *Gause v. Wiley*. 509

## EVIDENCE.

See *WITNESS*, 1, 2, 3, 4, 5, 6, 7, 9. *CONNECTICUT TITLE*, 1. *SURVEY*, 1. *WILL*, 1, 2, 3. *COURT*, 4, 5. *FRAUD*. *IMPROVEMENT*, 2, 3.

1. A book of original entries, verified by the oath of the party, is good evidence to prove the sale and delivery of lime, and it is not necessary to fortify the book by the oath of the carters, by whom the lime was received, to be delivered. *Gurra v. Crawford*. 3
2. If a book appear on inspection or the examination of the party by the Court, not to be a book of original entries, the Court may reject it as incompetent. If this does not clearly appear, it must be submitted to the jury to decide on. *ibid.*
3. In an action for the malicious abuse of legal process, the plaintiff may, in support of his declaration, give parol evidence of an agreement not to issue execution on a judgment, on a bond with warrant of attorney, without notice; but whether such an agreement is a good cause of action, is another matter, of which the defendant may avail himself, by demurrer, or by motion, in arrest of judgment. *Sommer v. Will*. 19
4. On the trial of an indictment for selling spiritous liquors without licence in the city of Philadelphia, a taxable inhabitant of the city is a competent witness; but one who has been actually taxed is not competent. *The Commonwealth v. Baird*. 141
5. A certificate under the seal of the secretary of the land office, "that he had carefully searched for a certain warrant, and the same could not be found," is legal evidence. *Weidman v. Kehr*. 174
6. The declarations of the person under whom the plaintiff derived his title, made during the time when he owned the land claimed by the plaintiff, that his warrant and survey did not cover the land in dispute, are evidence. *ibid.*
7. Recitals in a patent, are not evidence against a person claiming under the Commonwealth by title prior to the patent. *ibid.*
8. The notes taken by counsel, of the testimony of a deceased witness, supported merely by his oath, that he believes that he took down what the witness said as it fell from him, but has no recollection of what he said, except from his notes, cannot be received in evidence on a subsequent trial of the same cause, to prove what the witness testified. *Lighner v. Wike*. 205
9. The declarations of a person who is named an executor and devisee, in a paper purporting to be a testament and last will, are not evidence in a suit to which he is not a party, respecting the validity of such paper as a will. *ibid.*
10. Where the defendant gave evidence to prove communications of a very confidential nature, by a testator to a witness, it was held, that evidence of declarations by the testator, to another witness tending to shew that the first witness was not upon the terms of friendship and confidence with the testator which he pretended to be, was admissible. *ibid.*
11. The record of proceedings before two justices and twelve free-holders under the landlord and tenant law, is not conclusive evidence of the facts found by their inquiry; but the truth of them may be traversed in an ejectment brought by the tenant to try the title. *Galbraith v. Black*. 307
12. In general, evidence is not admitted to contradict a record; but where issue is joined on a special declaration in *assumpsit*, the plaintiff may give evidence in support of his case, though it may be inconsistent with the record of another action brought by him against the same defendant; but the effect of the evidence when given, is to be decided by the Court. *Bliss v. Hebble*. 346
13. In an action to recover compensation for services as a housekeeper, and for goods sold and delivered, evidence that the plaintiff was guilty of malfeasance in the execution of her trust, and embezzled the goods of the defendant, is not admissible by way of set off; but it may be received under the plea of non-assumpsit, to defeat the action. *Rock v. Shiner*. 249
14. Recitals of the title in a patent from the warrantee, down to the patentee, are evidence against a defendant who relies on possession alone, and shews no title. *Whitmore v. Napier*. 290
15. The probate of one of the witnesses to a deed certified by a Judge, but not under his seal, is sufficient. *ibid.*
16. The acts of a deputy surveyor, done in the course of his official duty, are evidence to shew for whom he made a survey; but acts which are not official, are not admissible. *Vincent v. The Lessee of Huff*. 396
17. A deposition taken under a rule of Court without notice to the opposite party, cannot be read in evidence, though a person having an interest in the subject of the dispute attend, without authority, and cross examine the witness. *ibid.*
18. The docket entries of the prothonotary, are not evidence of the issuing, service, and return of a writ. They are merely minutes of the officer; and the writ itself, with the return endorsed on it, should be produced. *ibid.*
19. When a deposition is to be taken before a justice of the peace, on interrogatories,

- it is his duty to put the interrogatories separately to the witness, and obtain a distinct answer to each; and if the witness refuse to answer, he should certify that fact at the foot of the deposition. If these things be not done, the deposition cannot be read in evidence. *ibid.*
20. If one party prove by evidence, a witness to be interested, the witness cannot purge himself of the interest by his own oath. *ibid.*
21. A release by a tenant in possession of all his interest in the land, will not make him a competent witness for his landlord; because he is interested in supporting the title, under which he holds possession. Upon the same principle, evidence, that the title is vested in another person, will not make him competent, because, if the plaintiff should recover, he is liable to be turned out of possession. *ibid.*
22. In an action of debt on bond, it was held, that under the plea of payment, with leave to give the special matter in evidence, the defendant might prove, that the plaintiff had agreed, that certain monies to be paid by the defendant should be deducted from the amount of the bond, and that he had paid them, without having given the notice of special matter required by the 11th rule of the Court of Common Pleas of Columbia County. *Bryson v. Ker.* 308
23. If a witness reside out of the state, what he swore on a former trial between the same parties, where the same point was in issue, may be given in evidence. *Magrill v. Kauffman.* 317
24. The acts and declarations of trustees and agents of a congregation, in their official capacities, both before and after its incorporation, are evidence against those whom they represent. But their confessions, made, not in the transaction of the business of their principal, are not evidence. *ibid.*
25. A warrant was taken out and paid for by a father, in the name of his sons, and on ejectment brought, the question being, whether the warrant was designed by the father, as an advancement to his sons, or whether a trust resulted to him; it was decided, that evidence might be given, of acts of ownership on the land by the father, and of declarations to explain those acts, in order to rebut the presumption, that the land was intended as an advancement. *Sampson v. Sampson.* 339
26. Where the question was, for which of two persons, bearing the same name, a warrant was designed; the Court held, that a party might, to shew for whom it was intended, give in evidence his own acts and declarations, down to the period of its date. *Simpson v. Hall.* 337
27. Recitals of *meane* conveyances in a patent, of an earlier date than the return of a survey which has been protracted on paper, are evidence to shew, that the interest of the warrantee is vested in the patentee. *Diggs v. Downing.* 348
28. The rule which precludes a man from giving evidence to destroy a paper, to which he has given credit by affixing his name, is confined to commercial, negotiable instruments, actually negotiated in the usual course of business. *Baird v. Cochran.* 397
29. In an action for a libel on the plaintiff, contained in an affidavit made by the defendant and sent to the governor, relative to the plaintiff's official conduct, in an office held at the governor's will, the want of probable cause in the defendant, may be left to the jury as evidence of malice. *Gray v. Penland.* 420
30. The proof of the fact from which malice is to be inferred, lies on the plaintiff. *ibid.*
31. Taking a warrant for, and having a survey made, but not returned, of a less quantity than a settler is entitled to, is not conclusive evidence of an intention to abandon the part not included; it is a circumstance which may be explained. Whether or not there has been an abandonment, is a fact which the jury from a view of the whole case, are to determine. *Porter v. M'Irroy.* 436
32. The draft of a deputy surveyor is only *prima facie* evidence of the situation of an adjoining tract for which it calls as a boundary. *Graham v. Moore.* 467
33. The declarations of a party, that a contract was fair, are evidence, but not conclusive, that the transaction was not fraudulent. *Duncan v. M'Cullough.* 483
34. On the trial of a feigned issue of *devisee vel non*, the declarations of a devisee, not a party to the suit, cannot be received in evidence, to invalidate the instrument set up as a last will. *Bevard v. Wallace.* 499
35. A witness, to refresh his memory may, with the consent of the parties, read a copy of a deposition to which he has formerly sworn. But if the contents of a paper, purporting to be a copy of the former deposition, be copied into the deposition he is about to make, and he swear to it, without recollecting at the time, all the matters contained in the former deposition, it cannot be received in evidence. But the answers of the witness to the questions put by either party at the time of taking the last deposition, are evidence. *ibid.*
36. Evidence is not to be considered secondary, unless it carries with it an indication that better remains behind. *Cutbush v. Gilbert.* 551
37. Receipts by third persons are not evidence to prove payments. The persons who gave the receipts, should be produced. *ibid.*
38. If, after the plaintiff has closed his evidence, without having made out such a case as will entitle him to recover, the defend-

not gives testimony, the plaintiff may give evidence to rebut that of the defendant, although by doing so, he supplies the defects of his case, as originally proved. *ibid.*

### EXECUTION.

See INSOLVENT LAW, 2, 3. ESTATE TAIL.

### EXECUTORS.

See APPRENTICE, 1, 2. ACTION, 3, 5.

1. An executor is liable in respect to all the assets which come into his hands, whether they arise in the county in which letters testamentary are granted, in another county or state, or even in a foreign country; and if letters testamentary be granted in another state, as well as in this, a suit may be maintained here, before the settlement of any administration account in the other state. *Swearingen's executor v. Pendleton's executor*. 389
2. If an executor, after the expiration of a year, apply the assets in his hands to the payment of legacies or distributive shares, to the prejudice of a creditor of whose claim he had no notice, it is a *devastavit*. *ibid.*
3. In an issue joined on the plea of *plene administravit*, which was found for the plaintiff, the jury, besides finding against the defendant on the issue joined, found also, that he had wasted the goods which came to his hands; and the Court below, ordered judgment for the whole amount of damages and costs to be entered *de bonis testatoris si, &c.*, *et si non, de bonis propriis* of the defendant. *Held*, that no issue being joined on the wasting of the testator's goods, what the jury found on that subject, was unauthorized, and that consequently, the judgment was erroneous. *ibid.*
4. When the verdict is for the plaintiff, on a plea of *plene administravit*, the judgment for all but the costs is *de bonis testatoris*. If however, on such a judgment a *feri facias* be issued, it is the duty of the sheriff, unless goods of the testator be shown by the defendant, to return a *devastavit*, which the defendant is estopped from denying, because the verdict is conclusive that assets were in his hands at the commencement of the suit. *ibid.*

### EXEMPTS.

See MILITIA, 1, 3, 4.

### EX POST FACTO LAW.

See ACT OF ASSEMBLY, 1.

### FEES.

1. The 26th section of the fee bill of 28th March, 1814, does not take away the right to compensatory fees, for services performed before the passage of that act, where such fees were by law allowable. *Levy v.*

*The Commissioners of Northumberland County.* 291

2. Fees for every service performed by an officer, whether mentioned in the table of fees which existed prior to the act of 1814, or not, cannot be allowed, but it seems, that some compensatory fees sanctioned by ancient usage, may be legally charged. *ibid.*
3. Prothonotaries, registers, recorders, and clerks of the Orphans' Court, are not entitled to be paid by their respective counties for office rent or fuel, prior to the erection of the public offices, nor for fuel, since their erection. *Lyon v. Adams*. 443
4. Prothonotaries are entitled to be paid by the county the expense of giving notice by public advertisement, when the acts and journals of the assembly come into their hands, and also the price of the book in which receipts are directed to be taken from each person, to whom they deliver a copy of the acts or journals; but they are entitled to no other allowances in relation to this business. *ibid.*
5. Prothonotaries are entitled to no fees for receiving and filing the returns of district and general elections, and transmitting copies of the said returns to the secretary of the Commonwealth; nor for performing the same services in relation to the election of President and Vice President of the United States; nor for filing the oaths of the persons elected county commissioners, and making out and delivering to the persons so elected, certificates agreeably to law; nor for entering the appointment of auditors for settling the public accounts of the county; but they are entitled to fees, for filing the reports of the auditors. *ibid.*
6. Prothonotaries are not entitled to any fees for entering the appointments of agents of the general election, for the different election districts; but they are entitled to fees, for giving notices under seal to the agents appointed. *ibid.*
7. Prothonotaries cannot recover of the county, fees in suits brought on forfeited recognizances, at the time when the money recovered in such suits was to be paid into the treasury of the Commonwealth. *ibid.*

### FEE SIMPLE.

See ESTATE TAIL.

### FEIGNED ISSUE.

1. A writ of error lies on a judgment of the Court of Common Pleas, in an issue framed under the supplement to the act for offering compensation to Pennsylvania claimants of certain lands, within the seventeen townships, &c., passed March 20th, 1810, notwithstanding the act declares, that the judgment and decree of that Court shall be final. *Moore v. Albright. The Same v. Cook*. 231
2. In framing such an issue, the Court of Common Pleas are to proceed according to their own judgment; and it is not ma-

terial who are the parties to the issue, provided the matters in controversy be fairly brought to trial. *ibid.*

3. The jury in an issue so framed, are to find generally for the plaintiff or defendant, and a verdict finding the sums due to each party, is bad. *ibid.*

### FEME COVERT.

See ACKNOWLEDGMENT, 1.

### FOREIGN ATTACHMENT.

1. The Court will not order the garnishee in a foreign attachment, to answer interrogatories filed under the act of 28th September, 1789, before the return of the *scire facias* against him. The interrogatories may be served with the *scire facias*, and if the garnishee makes any delay in answering them after the return of the writ, the Court will make such order as will accelerate the plaintiff's recovery. *Crammond v. Trustees of the late Bank of the United States.* 147
2. The Court dissolved a foreign attachment, because the plaintiff's affidavit stated, that the defendant, in consideration that the plaintiff would forbear to sue him for six months, promised to pay; without averring that he did forbear. *Mollet v. Fensera.* 543
3. It is not necessary that the plaintiff, in a foreign attachment, should, before the issuing of execution, give security for the restoration of the goods attached, if the defendant, within a year and a day should disprove the debt. He has until the sale. *Fitch v. Ross.* 557
4. The death of the defendant in a foreign attachment, after final judgment, does not dissolve the attachment. But the plaintiff must give security to the representatives of the defendant, who, within a year and a day, may come into Court, and proceed by writ of *scire facias*, *ad disprobandum debitum*, which puts the plaintiff to proof of his demand, and lets the representatives of the defendant into a full defence. *ibid.*

### FRAUD.

See EJECTMENT, 1. INSOLVENT LAW, 2, 3. EVIDENCE, 33.

Where a contract is in itself fraudulent, it is void, and cannot be confirmed by any subsequent declarations or acts, by which its fairness is acknowledged. *Duncan v. Mc Cullough.* 483

### GREENSBURG, BOROUGH OF,

See TAXES, 1.

### GUARDIAN AND WARD.

1. A ward, soon after arriving at age, being in bad health and anxious to remove to a milder climate, had a settlement with his

guardian, received the balance in his hands, and gave him a receipt in full; without which the guardian refused to deliver up the papers belonging to the estate. *Held*, that the receipt in full was not conclusive, and did not stand in the way of a new settlement under the authority of the Orphans' Court, though there was no fraud or circumvention. *Say's executors v. Barnes.* 112

2. Where a guardian uses the money of his ward, or neglects to invest it at proper times, he is chargeable with interest; and a reasonable rule is, to strike a balance of the money in his hands at the end of every six months, and charge him with simple interest on it, allowing a reasonable sum to remain in his hands, to meet contingent expenses. *ibid.*
3. A guardian is not entitled to commissions on sums charged against him for interest, beyond what was charged in the settlement made with the ward. *ibid.*
4. Commissions are not to be deducted at the foot of the account, but from time to time as the services for which they are chargeable are rendered. *ibid.*

### GUARDIANS OF THE POOR.

See SOLDIER.

### HABEAS CORPUS.

See PRIVILEGE.

### HIGHWAY.

See ROADS, 4.

### IMPROVEMENT.

See DESCENT, 1. WARRANT, 2, 3.

1. The general rule is, that the labour of a minor son will ensure to the use of the father, but if a father permit his son to improve and settle on a tract of land for his own use and benefit, his title is the same as if he had been of age when he commenced his improvement. *Galbraith v. Black.* 907
2. Where a warrant refers to an improvement, and mentions a particular day from which interest is to be paid on the purchase money, it is not necessary for the warrantee to prove an improvement on that day; he may give evidence of an improvement at any time subsequent to it, but prior to the issuing of the warrant. *Humes v. McFarlane.* 487
3. A warrantee cannot give evidence of an improvement made at any time prior to the day mentioned in his warrant for the commencement of interest, even where the board of property have decided, on a caveat entered against the acceptance of the survey made on his warrant, that his title originated in a settlement made by another person, at an earlier period, and have directed a patent to issue to him in virtue of that settlement. *ibid.*

## INDENTURE.

See *Negro and Mulatto*, 1.

## INDICTMENT.

See *Costs*, 3. 5.

1. What constitutes a good form of indictment for selling spirituous liquors, without license. *The Commonwealth v. Baird*. 141
2. An indictment stating, that the defendant feloniously stole, took, and carried away, "sundry promissory notes for the payment of money, of the value of 80 dollars, of the goods and chattels of A, B," is too vague and uncertain. The notes should be more particularly described, and it should be set forth, that the money was unpaid on them. *Stewart v. The Commonwealth*. 194
3. In an indictment for adultery, it is not necessary to state the township in which the defendant resided, when the offence was committed. *Duncan v. The Commonwealth*. 449

## INSOLVENT LAW.

1. A discharge under the insolvent laws of this state is valid, though the petitioner do not mention in the list of creditors returned to the Court, the name of the plaintiff at whose suit he is imprisoned; provided he has given the notice prescribed by the Court. *The Commonwealth v. Cornman*. 2
2. Where goods had been assigned by an insolvent debtor under the act of 26th March, 1808, but remained in his possession, with the permission of the assignees for more than eight years, it was held, that they were not liable to an execution for a debt contracted prior to the assignment, and due to a creditor who had signed a letter of license exempting the debtor from suits, and his property from executions, during the term of seven years after his discharge. *Wager v. Miller*. 117
3. It seems, that such length of possession would be fraudulent, with respect to a debt contracted after the discharge. *Ibid.*
4. If the Court appoint more than one trustee under the 2d section of the act of the 26th March, 1814, and only one give bond agreeably to the 3d section, he cannot exonerate the duties of his trust, and consequently, an action brought by him alone, cannot be maintained. *Park v. Graham*. 549

## INSURANCE.

Insurance on goods at and from St. Thomas's to Lagaira, and back, "warranted by the assured, free from any charge, damage or loss, which may arise in consequence of seizure or detention of the property, for, or on account of any illicit or prohibited trade." The vessel was captured by a Spanish privateer, within half a league of the Spanish coast, and rather

more than a league from Lagaira, and carried into Porto Cabello, where the goods were condemned under the decree of Aranjuez, of the 19th February, 1809, which adopted the Berlin decree of the 21st November, 1806, forbidding trade in British merchandise, and declaring all merchandise belonging to England, or coming from its manufactories and colonies, lawful prize. Held, that this was not a loss, by seizure for illicit or prohibited trade, within the meaning of the warranty. *Fauvel and another v. The Phoenix Insurance Company*. 29

## INTEREST.

See *GUARDIAN and WARD*, 2. 3. *COUNTY COMMISSIONERS*, 1. *IMPROVEMENT*, 2, 3.

## INTESTATE LAW.

See *DESCENT*, 1.

## JUDGMENT.

See *EXECUTORS*, 3, 4. *WARRANT OF ERROR*, 2.

## JUDGMENT BY DEFAULT.

See *COURT*, 1. 5.

The Court reversed a judgment by default, entered under the 5th section of the act of 21st March, 1806, prior to the time allowed by the act for the defendant's appearance. *Wingert v. Connell*. 237

## JURY.

See *VERDICT*, 1. *SURVEY*, 2.

## JUSTICE OF THE PEACE.

See *APPEAL*, 1, 2. *EVIDENCE*, 19.

1. Before the act of 30th March, 1810, it was not necessary, that the cause of action should be entered in the docket of a justice of the peace. If it appeared, that the case was within his jurisdiction it was enough. *Love v. Barton*. 269
2. The division of a township does not vacate the commissions of the justices of the peace of the district. *The Commonwealth v. The Sheriff, &c. of Northumberland county*. 275
3. The offices of justice of the peace and associate judge of the Court of Common Pleas are not incompatible with each other. *Ibid.*

## LANDLORD AND TENANT.

See *EVIDENCE*, 11.

1. A tenant, who endeavours to deprive his landlord of the benefit of possession, under a fraudulent pretence of giving it up, is still to be considered as a tenant, and cannot defend himself against his landlord, in an ejectment brought to recover possession. *Graham v. Moore*. 467
2. A person who comes into possession under a tenant, is in no better condition than

the tenant himself, and cannot defend his possession against the landlord. *ibid.*

LEASE.

If a lease be, "of all that tract of land situate, &c. supposed to contain — acres, more or less, now in the occupancy of A, B,," and A, B, occupy more land than the quantity expressed, lying on both sides of a line, afterwards in dispute with his lessor, it is a lease of all that he is in possession of. *Hall v. Powell.* 456

LEGACY.

See ACTION, 2, 3. ESTATE TAIL.

LETTERS OF ADMINISTRATION.

See REGISTER'S COURT, 1, 2.

LETTERS TESTAMENTARY.

See EXECUTORS, 1.

LIBEL.

See EVIDENCE, 29, 30.

LIMITATIONS—ACT OF

1. A title by warrant and survey, without patent, is within the act of limitations of 26th March, 1785, and is barred by an adverse possession of twenty-one years. *McCoy v. The Trustees of Dickinson College.* 302
2. The general rule is, that after a sale of land, and before a conveyance of the legal title, the vendor is the trustee of the vendee, and the act of limitations will have no operation. But where the vendor disavows the trust, and after having delivered possession to the vendee, makes a lease to a third person, in opposition to the title of the vendee, and the lessee enters and holds possession, the jury may presume a disseisin; and if the vendee suffer twenty-one years to elapse without prosecuting his claim, it will be barred by the act of limitations. *Pipher v. Lodge.* 310
3. If the rightful owner of a tract of land, is in actual possession of a part, he is in constructive and legal possession of the whole, unless he is actually disseised; but if a man enter wrongfully, into the possession of another, his possession does not extend beyond his actual enclosures and improvements, and the statute of limitations, will protect no other possession. *Hall v. Powell.* 456

LOTTERY.

A lottery for the disposal of land, is within the prohibition of the act of 17th February, 1762; and no action can be sustained for the price of a ticket. *Seidenbender v. Charles's Administrators.* 151

MAINTENANCE.

After a pardon of the crime of adultery, the Court may proceed to make an order for the maintenance of the bastard child, which was the fruit of the adultery. *Duncan v. The Commonwealth.* 449

MANDAMUS.

See COUNTY COMMISSIONERS, 1, 4.

MILITIA.

1. In order to be entitled to be placed on the exempt list, under the 2d section of the act of 19th March, 1816, it is not necessary that any positive, affirmative act, should be done, expressive of a desire not to be enrolled; every person who does not expressly declare whether or not he wishes to be enrolled, is to be considered as an exempt. *The Commonwealth v. Cornman.* 83
2. The proceedings of the court of appeals, on matters submitted to them according to law, cannot be questioned in this Court on a *habeas corpus.* *ibid.*
3. The jurisdiction of the court of appeal, extends to cases of exemptions, who are entitled to be heard before that court. *ibid.*
4. If a person who is intitled to be placed on the list of exemptions, be returned as an enrolled militia man, with a fine imposed on him for non-attendance at parade, and he do not appear before the court of appeal to claim his privilege, in consequence of which, he is returned by the president of the Court to the brigade inspector, in the list of persons whose fines have not been remitted, his case is to be considered as having been before the court, and a judgment pronounced upon it; and it being a matter within their jurisdiction, their sentence is conclusive. *ibid.*
5. A warrant directed by the brigade inspector to a constable, commanding him to levy the fine for non-attendance at parade, on the goods and chattels of the delinquent, and for want of such goods and chattels, to take his body and convey him to prison, *there to be kept, until the fine and costs are paid,* is bad; the 23d section of the act of 28th March, 1814, only authorising in such cases, an imprisonment for not less than one, or more than two months, at the discretion of the field officers of the regiment, to which the delinquent belongs. *ibid.*
6. It seems that if the field officers of the regiment, before any warrants are issued, were to determine the period of imprisonment in the case of each delinquent, a warrant commanding a constable to levy on property if to be found, but, if not, to imprison the delinquent for the time directed by the field officers, with a recital that the said officers had, in pursuance of the act of assembly, directed the imprisonment to be for such a time, would be good. *ibid.*

**MORE OR LESS.**See **OVERPLUS.****MOYAMENSHING TOWNSHIP.**See **ROADS, 1.****NEGOCIABLE INSTRUMENT.**See **EVIDENCE, 32.****NEGRO AND MULATTO.**

1. A negro or mulatto servant, who binds himself in another state to serve his master until the age of 25 years, in consideration of manumission, and is brought into Pennsylvania to reside, cannot be removed out of the state without his consent; although the indenture contain a covenant to serve his master in Pennsylvania, or any other State; such a covenant is void. Nor can his master imprison him, in order to compel his consent. *The Commonwealth v. Hanbriht.* 218
2. The report required by the 4th section of the act of 29th March, 1783, to be made under oath of the age, name, and sex, &c. of a negro or mulatto child, should state the age with such certainty, as to leave no doubt, that the report was made within six months after the birth of such child. *The Commonwealth v. Green.* 425

**NEW TRIAL.**

The Court possess the power of setting aside verdicts, where disproportionate and enormous damages have been given; but it must be a rank case, to induce them to exercise that power. Therefore in an action for the malicious abuse of process, the Court refused to award a new trial where all the facts and circumstances of the case were fairly submitted to the jury, although they considered the damages unreasonably high. *Sommer v. Will.* 19

**NOTICE.**

See **INSOLVENT LAWS, 1. ASSIGNMENT. EVIDENCE, 32. WARRANT AND SURVEY, 1, 2, 3.**

**OFFICES.**See **JUSTICE OF THE PEACE, 3.****ORPHAN'S COURT.**See **ADMINISTRATION ACCOUNT, 1.**

A decree of the Orphan's Court refusing to confirm an inquisition for the partition of lands under the intestate law, and setting aside the proceedings, in consequence of the exhibition of a paper, purporting to be the last will of the person who died seized, the validity of which had not been tried under an issue directed by the Register's Court, was affirmed by this Court, notwithstanding the heirs at law had recovered

ed a moiety of the land, in an ejectment against the widow, who claimed the whole under the asserted will, and parol proof was given, that the validity of the will was directly in issue in that suit. *Spangler v. Rambler.* 192

**OVERPLUS.**

A, being seized of a tract of land, containing 400 acres conveyed to B, a part of it, described by boundaries, which, however, were vague, and did not completely surround it; and stated to contain 300 acres more or less. It was afterwards surveyed by a person appointed by both parties, who informed them, that the survey contained 300 acres, with allowance of six per cent., for roads, &c. The land thus surveyed, was delivered by the grantor to the grantee, by whom it was held during his life, and by his widow after his death. After the death of both the grantor and grantee, and thirteen years after the execution of the deed, it was discovered, that the tract contained 215 acres, 141 perches, instead of 300 acres.

*Held*, That the heirs of the grantor were not entitled to recover the overplus of 13 acres, 141 perches. *Glen v. Glen.* 433

**PARDON.**See **COSTS, 5. MAINTENANCE.****PARENT AND CHILD.**See **IMPROVEMENT, 1.****PAROL EVIDENCE.**See **EVIDENCE, 3.**

Parol evidence is admissible to prove, that after the execution of a deed, conveying a right to a water course through the granted land, by courses and distances, a verbal agreement was entered into between the parties, for their mutual accommodation, altering the route of the water course; provided the agreement has been carried into effect. *Le Fevre v. Le Fevre.* 241

**PARTITION.**See **ORPHAN'S COURT.****PARTNERS.**See **PROMISSORY NOTE, 1, 2.**

One partner cannot bind his co-partner by giving a note in the name of the firm, for his own private debt. *Baird v. Cockran.* 397

**PATENT.**

See **EVIDENCE, 7. 27. ACT OF ASSEMBLY, 2. IMPROVEMENT, 8.**

**PENAL LAWS.**See **ACTION, 1. PENALTY.**

PLEADING.

See CORPORATIONS, 2. EVIDENCE, 13. 22.  
EJECTMENT, 5. EXECUTOR, 8.

1. Coverture, after the bringing of the suit, cannot be pleaded after a plea in bar, unless it took place after the plea in bar; in which case it may be done, but the defendant must not suffer a continuance to intervene between the happening of this new matter or its coming to his knowledge, and pleading it. *Wilson v. Hamilton.* 238
2. The plaintiff is not bound to reply to a plea in abatement put in out of time. Therefore, if the cause be tried on the former plea, though no issue be joined on a plea in abatement, it is not error. *ibid.*

POSSESSION.

See LIMITATIONS, ACT OF, 3. TRESPASSER.  
LANDLORD AND TENANT, 1, 2.

PRACTICE.

See FOREIGN ATTACHMENT. EVIDENCE,  
22. 38. JUDGMENT BY DEFAULT. COURT,  
3, 4.

1. In a criminal case, the Court will receive a motion in arrest of judgment at any time during the Term. *The Commonwealth v. Tighman.* 127
2. On a rule to shew cause of action, this Court will not receive supplementary affidavits. *Eldridge v. Robinson.* 548

PRIVILEGE.

When another Court, has refused to discharge one of its own suitors from arrest, on the ground of privilege, this Court will not relieve on *habeas corpus*. *The Commonwealth v. Hambricht.* 149

PROMISSORY NOTE.

See PARTNERS, 1.

1. Promissory notes in the nature of bank notes, issued by an unincorporated association, after the act of 21st March, 1814, and prior to the act of 22d March, 1817, are recoverable in a suit against the members of the association, as partners. *Hess v. Werts.* 356
2. Though such notes contain a promise to pay, "out of their joint funds according to their articles of association," yet the members are personally liable. *ibid.*
3. If the maker of a promissory note is not to be found when the note becomes due, a demand on him of payment is not necessary, in order to charge the indorser. But it is necessary to prove, either a demand, or due diligence, in endeavouring to make a demand. *Duncan v. McCullough.* 480
4. It is not incumbent on the indorser of a promissory note, to shew the holder, where the maker is to be found. *ibid.*

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RECOGNISANCE.

See APPEAL, 4. FEES, 5.

RECORD.

See EVIDENCE, 12.

REGISTER'S COURT.

1. The Register's Court have a right to revoke letters of administration granted to a person not entitled to them, and direct to whom new letters shall issue. *Stoever v. Ludwig.* 201
2. A decree of the Register's Court, revoking letters of administration, and directing them to issue to another person, which decree has been appealed from by the administrator, does not, while the appeal is pending and undetermined in the Supreme Court, suspend his power to proceed in the recovery of debts due to his intestate. *Shaufler v. Stoever.* 202

ROADS.

1. The act of 26th March, 1808, respecting roads in Moyamensing, does not repeal or interfere with the general road law of 6th April, 1803, as respects that part of Moyamensing township which is embraced by the act of 1808. *Case of the Road from Fitzwater street, &c.* 106
2. The Court will not quash the proceedings in a road case, because one of the viewers signed the report by a different surname from that by which, through a clerical mistake, he was named in the certificate of appointment. *ibid.*
3. The Quarter Sessions having confirmed the report, this Court will presume that they were satisfied, that the persons who signed it, were the same as those who were appointed. *ibid.*
4. In common parlance, the word "street" is equivalent to the word "highway." Therefore, if the petition be for a street, and the report of the viewers be of a street, the proceedings are not vitiated thereby. A substantial compliance with the act is all that is required. *ibid.*
5. The Court will quash the proceedings in a road case, where one of the original petitioners is appointed a reviewer. *Case of the Road from McClellanburg, &c.* 200

SALE.

See APPROVED PAPER. LIMITATIONS, ACT  
OF, 2.

SCIRE FACIAS.

See FOREIGN ATTACHMENT, 3.

SET-OFF.

See EVIDENCE, 13.

SETTLEMENT.

See IMPROVEMENT, 3. WARRANT AND SURVEY, 3. WARRANT, 2, 3.



**SHERIFFS' SALE.**

See ESTATE TAIL.

**SOLDIER.**

The act of Congress of 16th March, 1802, prohibiting the arrest of soldiers for any debt under the sum of twenty dollars, contracted before enlistment, or for any debt contracted after enlistment, does not extend to a soldier committed by an alderman for want of security to appear at the Mayor's Court to answer a charge of having deserted his wife and family, and left them a charge on the guardians of poor. *The Commonwealth v. The Keeper of the Jail of Philadelphia.* 505

**STATUTE.**

See ACTION, 1.

**SUPERSEDEAS.**

See WRIT OF ERROR, 1.

**SURVEY.**

See EVIDENCE, 16. OVERPLUS, 1. WARRANT AND SURVEY, 1, 2, 3. WARRANT, 1.

1. Great regard is to be paid to the return of a deputy surveyor, and even slight evidence of lines or corners marked, will justify a jury in presuming, that the survey was made as returned; but the running of one line only is not sufficient to establish a return of survey. *Fugate v. Caze.* 393
2. Where the courses and distances expressed in a return of survey, differ from the natural and artificial boundaries on the ground, the latter are to prevail; unless land has been intentionally thrown out, which is a fact for the jury to decide. *Hall v. Powell.* 456

**TAXES.**

1. The burgesses, &c. of the borough of Greensburg, in the county of Westmoreland, have no authority to assess and levy a tax on the public property belonging to the county, situate within the limits of the borough. *Piper v. Singer.* 354
2. It seems, that the property of counties is not taxable for city or borough purposes. *ibid.*

**TOWNSHIP.**

See JUSTICE OF THE PEACE, 2. INDICTMENT, 3.

**TRESPASSER.**

If the proprietor of a surveyed tract, passes over his line and cuts wood on the vacant land of the Commonwealth, he not only acquires no title to the vacant land, but is to be considered as a trespasser. If, how-

ever, he has enclosed the land, he may defend his possession against an intruder, without right; for where both are trespassers, *potior est conditio defendentis.* *Graham v. Moore.* 467

**TRUST.**

See EVIDENCE, 23.

**TRUSTEE.**

See LIMITATIONS, ACT OF, 2. EVIDENCE, 24. WITNESS, 7. INSOLVENT LAWS, 4.

**VACANT LAND.**

See ACT OF ASSEMBLY, 1, 2.

**VERDICT.**

See EJECTMENT, 3.

Juries have no power to alter the contract between the parties, or to substitute one substantially different. A verdict so framed is void. *Witman v. Ely.* 360

**WARRANT.**

See MILITIA, 5, 6. EVIDENCE, 25, 26. DESCENT, 1. WARRANT AND SURVEY, 1, 3. IMPROVEMENT, 2, 3.

1. A warrant dated in 1763, and totally abandoned until 1812, may give no right; but it may give a perfect right if it has been followed up in a reasonable time by a survey which has been destroyed without the fault of the warrantee; or it may give a right, even without a survey, if it describe the land with reasonable certainty, and the warrantee has taken possession under it, designated the boundaries in such a manner as to be well known to the neighbours, and retained a continued possession until the time of his survey in 1812. *Graham v. Moore.* 467
2. A warrant issued since the act of 23d September, 1794, for land on which grain has been raised, but no settlement made with a view to residence, and the support of a family, is illegal and vests no title. *Branyan v. Fückenger.* 501
3. It, however, an improvement be begun, and grain raised in contemplation of following it up by residence, and this design be persevered in according to law, the title will relate to the commencement of the improvement. *ibid.*

**WARRANT AND SURVEY.**

See LIMITATIONS, ACT OF, 1. EVIDENCE, 29. WARRANT, 1.

1. After a warrantee has had a survey made and marked upon the ground, he has fully exercised his rights as to the land to be appropriated, and the customary permission to locate his grant again, can never be allowed to the prejudice of third persons. If, therefore, a warrantee, after having made a survey on the ground on a

- descriptive warrant, protract the lines of the survey on paper, so as to include land which was not embraced by the lines marked upon the ground, his title to the land thus taken in, relates only to the return of survey, because it is founded on a new contract, to which the assent of the Commonwealth is not given until that time, and if a title be previously acquired under the Commonwealth, by one who had no notice of the protraction of the lines of the first survey, it will not be affected by it. *Diggs v. Downing.* 348
2. A survey thus protracted and remaining in the hands of the deputy surveyor, is no notice that the protraction on paper is different from the lines marked upon the ground. *ibid.*
3. A, took out a warrant in trust for B, on which a survey was made in the following year, on land which had been previously improved, and which answered the calls of the warrant. The survey was never returned, but B, and those who claimed under her, constantly resided on the land. Fourteen years afterwards a second survey was made, by virtue of the same warrant on other land, which also answered the calls of the warrant. This survey was not returned, nor were the surveying fees paid, nor was any improvement made on, or possession taken of, the premises. *Held*, that the survey was void, and would not prevail against a fair settler, although he had actual notice of it, before he began his settlement. *Smith v. Fulz.* 473

WILL.

See OXFORD'S COURT. DEVISE, 1, 2. EVIDENCE, 3.

1. If a man, having two wills in his hand, intending to destroy the last, by mistake destroys the first, the law does not require, in order to revive and establish the will intended to be destroyed, such proof as is necessary to give validity to an original will; viz. proof by two witnesses. *Burns v. Burns.* 295
2. Evidence of the intention of the testator, as to which will he intended to destroy, may be rebutted by contrary evidence, though by but one witness. *ibid.*
3. The act of assembly being silent as to revocations in law, questions arising on such revocations, must be proved as other matters of fact, without regard to the form prescribed by the act of assembly, for the probate of wills. *ibid.*
3. B, G, died, leaving to survive her B, H, a daughter of T, P, deceased, a brother of R, G, of the whole blood, and a nephew and several nieces, the children of G, P, a brother of B, G, of the half blood. In her life-time R, G, inclosed in a paper which she placed in a mahogany box, several bonds, and a certificate of bank stock, which were so found by the administrator

after her death, with the words, "For R, H," written on the envelope, in R, G's own hand-writing, which was proved by two witnesses. She also inclosed in her life-time, in another paper, which was so found by the administrator after her decease, several other bonds, among which was one from G, P, to R, G, on which there was a testamentary indorsement, in favour of her nephew, the son of G, P, dated five years before her death. On the envelope of the last mentioned bonds, the words "For the heirs of G, P," were written in the hand-writing of R, G, which was also proved by two witnesses. The papers so directed and indorsed, remained in the possession of R, G, during her life, without her having made any delivery of them in any form, or having communicated the circumstance to any one. *Held*, that the papers so indorsed, could not be admitted to probate, as a will in writing of R, G. *Phonstead's Appeal.* 545

WITNESS.

See EVIDENCE, 4, 8, 15, 20, 21, 23, 34, 35. WILL, 1, 2, 3. COURT, 4.

1. It is no objection to the competency of a witness, that he believes himself interested in the event of the suit, when in fact, he is not so. *Long v. Bailey.* 232
2. Nor will an honorary engagement which cannot be enforced at law, exclude his testimony. *ibid.*
3. A witness cannot deprive a suitor of his testimony, by becoming interested, for the purpose of rendering himself incompetent. *ibid.*
4. If a witness state his impressions from particular circumstances, without stating what those circumstances were; e.g. if he state, that "in all the different conversations with I, S, he always understood the said I, S, allowed the land in dispute to be the property of C, S," and nothing more, his deposition cannot be read. *Sampson v. Sampson.* 329
5. A witness in a civil suit may be compelled to give evidence which may affect his interest, provided it does not tend to convict him of a crime, or subject him to a penalty. *Baird v. Cochran.* 397
6. The grantor in a deed, is a competent witness, to prove that when he executed it, he had no title. *Brown v. Downing.* 404
7. One who has purchased land in his own name, but as agent and trustee of another, to whom he afterwards conveyed the legal title, is a good witness to prove the trust. *ibid.*
8. The Court will not reverse a judgment for errors, which an inferior Court may commit, in the course of a preliminary examination of a witness, which is totally unnecessary to his admission. *ibid.*
9. A witness may be permitted to swear for

whom an application was intended by the person who put it into the land office. Whether he speaks from such knowledge as will entitle him to belief, is a matter, of which, the jury are to judge. *Loose of Belancy v. Little.* 503

#### WRIT OF ERROR.

See ARBITRATION, 5. FRIGNED ISSUE, 1.  
CERTIORARI, 1. EXECUTOR, 5.

1. A cause is well removed by writ of error,

though the recognisance of bail be not conformable to law, but the writ will not operate as a supersedeas. *Magill v. Kaufman.* 517

2. Where a writ of error is brought by the plaintiff, this Court may enter such judgment as ought to have been entered below; but where it is brought by the defendant, the judgment can only be reversed. *Swearingen's executor v. Pendleton's executrix.* 529

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